Supreme Court, U. S.
FILED
JUL 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians *ad litem*, on her own behalf and on behalf of all others similarly situated,

Petitioners,

—v.—

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Susan Vorchheimer, on her own behalf and on behalf of the class she represents, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered March 16, 1976, rehearing en banc denied April 12, 1976.

Opinions Below

The March 16, 1976 opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the April 12, 1976 order denying rehearing en banc is not yet reported; both are set out in the Appendix, infra, at 1a-36a. The August 7, 1975 Findings of Fact, Conclusions of Law, Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania are reported at 400 F. Supp. 326; they are set out in the Appendix, infra, at 38a.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered March 16, 1976; a timely petition for rehearing en banc was denied April 12, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the Constitution and laws of the United States permit a municipal public school system to maintain totally sex-segregated senior high schools for scholastically superior students, where the effect is to reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities.

Constitutional Provision and Statute Involved

The fourteenth amendment to the United States Constitution provides in pertinent part:

> **No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758 (Supp. 1976), provides in pertinent part:

> 1701(a) The Congress declares it to be the policy of the United States that --
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . .
>
> 1702(a) The Congress finds that --
>
> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the fourteenth amendment . . . .

1703 No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by --

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . . sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .

1705 [T]he assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational

opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of . . . sex . . . .

STATEMENT OF THE CASE

Petitioner, secondary school student Susan Vorchheimer, commenced this class action on March 29, 1974, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. She sought to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to Central High School, Philadelphia's most renowned, scholastically-oriented secondary school.[1]

At both the junior and senior high school levels, Philadelphia maintains "academic" schools for scholastically superior students. Susan Vorchheimer attended Masterson School, a coeducational academic junior high school. Upon graduation in June 1974, she was designated most outstanding student and received several other awards, including the awards in science and geometry. Despite her conceded academic

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1 **Pursuant to Fed. R. Civ. P. 23(b)(2), Susan Vorchheimer was certified as the representative of all females who otherwise meet Central High School's admission standards but have been, are, or will be denied admission to Central because of their sex. (Conclusion 3.)**

qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex. (Fact Findings 12, 14, 15; Conclusion 4.)

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High, which as the name implies, is confined to females. These two schools differ from other Philadelphia secondary schools in fundamental respects. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from the entire city; all other schools operate on a neighborhood basis. Most Philadelphia high schools are substantially overcrowded; enrollment at Central and Girls is under capacity. (Fact Findings 6, 7, 29, 51.)

Central and Girls are single-sex schools; the vast majority of public high school students in Philadelphia attend coeducational schools. (Fact Finding 8.) A senior high school student seeking the highest quality academic preparation the District offers does not have the choice of attending a coeducational school. (Conclusion 5.)

Central was founded in 1836. The first public high school in Philadelphia and the second in the nation, it has consistently maintained a national reputation for academic excellence. (Fact Findings 17, 20.) Girls

High evolved from a school established in 1848 for the primary purpose of training teachers for Philadelphia's public schools. (Fact Finding 18.)

It is undisputed that Central's scientific facilities are superior to those of Girls High. (Fact Finding 26.)

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma mater. Central is the only high school in Philadelphia with a substantial private endowment. (Fact Findings 20, 22.)

These plain facts, found by the district court and not contested on appeal by Philadelphia School District, explain the unique position of Central. No similar findings were made, nor could they be made, as to Girls: it has not attracted the same national attention, alumni contributions or endowment; its science facilities are inferior to those of Central.

Based on these findings, the district court held that Central's exclusionary policy adversely affects Susan Vorchheimer and the class she represents by denying them the opportunity to attend a coeducational, academically superior public high school, a school with an unequaled history and national reputation. 400 F. Supp. at

342. The court noted that fostering career successful women is not one of Philadelphia's objectives in excluding females from Central. (Conclusion 5.) Males, not females, the court determined, are the intended beneficiaries of Philadelphia's exclusionary academic high school arrangement. 400 F. Supp. at 342. Concluding that the arrangement denied females the equal protection of the laws, the court enjoined Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any other member of the class she represents to Central High School solely on the basis of her sex."

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"), the Court of Appeals for the Third Circuit reversed 2-1.[2] The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." Further, it called attention to the fact that "in the scientific field . . . Central's [academic facilities] are superior." Inexplicably, in light of the record and fact findings below, the majority held Susan

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2 Judge Gibbons dissented; Judge Weis was joined in the majority by Chief Judge Markey of the Court of Customs and Patent Appeals.

Vorchheimer and those she represents are not denied the equal protection of the laws by their exclusion from Central. In addition, ruling on a statutory issue not aired in the district court,[3] the majority held Congress could not have meant what it said when it declared in 1974:[4]

> **[T]he maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. §1702(a)(1).**

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3 This issue, the application of the Equal Educational Opportunities Act of 1974, was raised sua sponte by the court of appeals.

4 See also 20 U.S.C. §§1703(c), 1705, 1715.

Reasons for Granting the Writ

The central question raised in this case is whether a municipal public school system, consistent with the equal protection principle, may enforce separation of the sexes in its academic high schools to the detriment of female students. The system in question offers no option, no freedom of choice to the student qualified for and desiring admission to an academic high school. No coeducational facility is provided for the scholastically superior student; she must accept assignment to an all-female facility, a facility less celebrated and richly endowed than the all-male facility, or forgo the opportunity to attend a secondary school with high admission standards offering only college preparatory courses. It is petitioner's position that the officially mandated segregation imposed on intellectually gifted females by the arrangement in question reinforces a tradition that channels and curtails young women's aspirations and opportunities, and retards progress toward a society in which women and men associate with each other as full and equal partners.

I.

The Ruling of the Majority Below, Sanctioning Exclusion of Girls from a Municipal Public School System's Most Renowned and Richly Endowed Secondary School, with Superior Facilities in the Scientific Field, is Inconsistent with Decisions of this Court Establishing as Constitutional Principle the Right of Females to the Genuinely Equal Protection of the Laws.

A.

Plaintiff Susan Vorchheimer, in this class action on behalf of scholastically superior female students, has maintained throughout the litigation that Philadelphia's two academic secondary schools, Central and Girls, are not equal. Some, but far from all of the differences reflected in the trial record, are reported in the district court's Fact Findings. (See Findings 17, 20, 22, 26.) The court of appeals majority, although it paid scant attention to the trial record[5] and did not advert to quality distinctions noted by the district court, did acknowledge: facilities in the scientific field are superior at Central. 532

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5 **A record that flatly contradicts the court of appeals majority's gratuitous and wholly unfounded assertion, 532 F.2d at 886, that Susan Vorchheimer does not claim "deprivation of an education equal to that which the school board makes available to boys."**

F.2d at 882. Thus any pretense of fully equal, albeit separate, educational facilities for girls is belied by the record, the district court's unchallenged findings, and even the grudging recognition by the court of appeals majority that Susan Vorchheimer, most outstanding student in her academic junior high school and winner of that school's science and geometry awards, was barred, solely on account of her sex, from the Central school, an institution with scientific facilities unmatched at the Girls school open to her.

While Girls High is a distinguished school in its own right, its facilities, history and associated qualities do not fully equal those of Central. As the city's first and the nation's second public high school, Central is uniquely rich in tradition and prestige; its alumni, loyal and generous as college alumni, have established a private endowment for Central; Central's graduates, an influential group within Philadelphia, have become leaders in business, the professions, politics, and the academic world; Central's reputation has attracted distinguished speakers to the school, including Presidents and other high-ranking federal officials. Girls High is not privately endowed, nor does it have a speaker's program attracting the nation's foremost leaders; the number of its influential graduates does not approach that of Central. See 400 F. Supp. at 328-329.

In short, Central possesses to a "greater degree [than Girls] those qualities

which are incapable of objective measurement but which make for greatness in a . . . school." See Sweatt v. Painter, 339 U.S. 629, 634 (1950). In this case, as in Sweatt, a school's historic standing in the community, and its well-positioned, influential, and highly supportive alumni, should be of overriding significance in determining whether reservation of the school to a dominant class denies equal protection to members of the excluded class.

B.

The quick write-off of plaintiff's constitutional claim by the majority below rests on failure to comprehend the vibrant principle reflected in this Court's precedent from Reed v. Reed, 404 U.S. 71 (1971), through Stanton v. Stanton, 421 U.S. 7 (1975). Sweatt v. Painter, 339 U.S. 629 (1950), as well as Brown v. Board of Education, 347 U.S. 483 (1954), were deemed "inapplicable" by the court of appeals majority because those decisions involved race rather than sex classifications. 352 F.2d at 886.[6] More thoughtful assessment

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[6] It is difficult to perceive on what basis the majority below deemed Sweatt "inapplicable," for that case was decided during the era in which Plessy v. Ferguson, 163 U.S. 537 (1896), held sway.

of this Court's post-Reed gender discrimination/equal protection decisions, see, e.g., Note, 89 Harv. L. Rev. 95 (1975), should have revealed that Sweatt and Brown are very much in point. As the Court recently observed, historic legal and political discrimination based on sex, like discrimination based on race, has been severe and pervasive. And more than other identifying criteria (national origin, alienage) elevated to the "suspect" categories, race and sex carry "an obvious badge." Mathews v. Lucas, 44 U.S.L.W. 5139, 5142 (June 29, 1976). For these reasons, the Court closely reviews official conduct alleged to deny genuinely equal opportunity to women. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

C.

Principal reliance was placed by the majority below on Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971),[7] an authority not genuinely in point. For that case entailed no optionless sex segregation, nor any educational disadvantage imposed on members of one sex. Williams v. McNair concerned the State of South Carolina university

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7 The majority saw "no basis for differentiation between Williams and the case at bar," and viewed that decision as "strong, if not controlling authority." 532 F.2d at 887.

system, a system comprising a wide range of educational institutions, all but two of them coeducational. The first exception, the Citadel, was an all-male college. Designated as a military school, the Citadel granted degrees in engineering and also offered a full complement of undergraduate liberal arts courses. The second, Winthrop, was "designed as a school for young ladies . . . [giving] special attention to many courses thought to be specially helpful to female students." 316 F. Supp. at 136.[8]

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8 A clarifying footnote to the district court's opinion sets out relevant provisions of the South Carolina Code as follows (316 F. Supp. at 136 n.3):

> See Section 401, Title 22, Code of South Carolina (1962):
>
> "There shall be established an institution for the practical training and higher education of white girls which shall be known as Winthrop College * * *."

In Section 408, Title 22, the purpose of Winthrop College was stated to be:

> "The establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State, the main object of which shall be (1) to give to young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness . . . .

Plaintiffs in Williams v. McNair were males who sought admission to Winthrop. They were "free to attend either an all-male or . . . a number of co-educational institutions at various locations over the State." 316 F. Supp. at 137-38. They claimed no special feature connected with Winthrop that would "make it more advantageous educationally to them than any number of other State-supported institutions." 316 F. Supp. at 138. In short, the sole factor on which their preference for Winthrop rested was its proximity to their homes. Ruling that the Constitution does not safeguard to students a right to attend the State college in their home town, the district court entered judgment for defendants and this Court summarily affirmed.[9]

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9 The district court opinion in Williams v. McNair does essay appraisal of the then "state of the art" on constitutional challenges to official line drawing by gender. The opinion sets out as the most recent High Court expression Hoyt v. Florida, 368 U.S. 57 (1961), a decision now overturned, see Taylor v. Louisiana, 419 U.S. 522 (1975); it states that gender-based discrimination by law or regulation is constitutional unless "wanting in any rational justification." 316 F. Supp. at 136. This Court's summary affirmance in Williams surely does not imply agreement with that proposition. Rather, full opinions of "this Court treating the question on the merits," cf. Edelman v. Jordan, 415 U.S. 651, 671 (1974), indicate the heightened review standard evolving in gender discrimination cases since Reed v. Reed, supra, the path-marking decision rendered some months after the Williams summary affirmance. See, e.g., Weinberger v. Wiesenfeld, supra, Stanton v. Stanton, supra.

In stark contrast, the instant case presents a grave issue not even remotely involved in Williams v. McNair: May a public school system deny females access to an educational institution that does offer special features, an institution that is more advantageous educationally to them than any other institution, an institution possessing qualities, including the "position and influence of the alumni," that give it unparalleled standing in the community. See Sweatt v. Painter, supra, 339 U.S. at 634.

D.

Even if Girls facilities approached the theoretical "separate but equal" model, the claim of Susan Vorchheimer and the class she represents would be well-founded. The very names assigned to the two schools tell the story; they are symbolic of a larger inequality identical facilities would not cure. Teen-age Susan Vorchheimer put it this way: "I liked the atmosphere [at Central] and also what I had heard . . . about its academic excellence." "I didn't think I would be able to go [to Girls High] for three years and not be harmed in any way by it." More senior scholars, addressing the issue of exclusion of women from men's colleges, elaborated:

> The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But

> it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority -- assumptions for which women must eventually pay. (C. Jencks & D. Reisman, The Academic Revolution 297-98 (1968).)[10]

In sum, Philadelphia School District's refusal to admit Susan Vorchheimer and her class to Central, and its insistence that these academically-gifted young women be content with their place at Girls, viewed in historical and social context, carry a clear message. The District policy places an official imprimatur on categorization of females as members of "the second sex."

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10 Cf. this Court's recognition in Brown v. Board of Education, supra, 347 U.S. at 494:

> To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.

Jencks & Reisman, supra at 298, further observed that men too pay a price for the sexual arrogance preserved by all-male schools. They also stated that the arguments against women's colleges are not as persuasive as the arguments against men's colleges: "This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense."

E.

No evidence in the record supports the theory that achievement of Philadelphia's academically superior students is greater in sex segregated schools than in coeducational schools.[11] Nor does the operation

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11 Two expert witnesses were presented by the School District: Dr. Jones who reported on an attitude (not achievement) survey he administered in New Zealand general schools; Dr. Tidball, who reported the results of her random selections from Who's Who in American Women for the period from the 1910's to the 1950's. Dr. Jones acknowledged, and the district court found, that the New Zealand survey was uninstructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically superior students. (Fact Findings 39-50; Conclusion 5.) Dr. Tidball's sampling is hardly a measure of what females could achieve at a school with Central's history, national recognition, accomplished and loyal graduates. A 1910's to 1950's Who's Who search would turn up not a single woman achiever from the nation's most prestigious, richly endowed colleges. For the gates of, e.g., Princeton, Yale, Harvard, Dartmouth, Brown, Amherst, like Central's door today, were then shut to women.

of academic high schools on a totally sex segregated basis promote freedom of choice. For scholastically superior students seeking the best academic education the Philadelphia system offers, there is no coeducation option. Far from establishing a "fair and substantial relationship" to legitimate objectives the school board seeks to advance, see Reed v. Reed, supra, 404 U.S. at 76, Philadelphia School District's policy reinforces a tradition that retards progress toward a society in which women and men associate with each other as full and equal partners.[12]

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12 As stipulated in the district court, "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." 532 F.2d at 882. But nothing in the stipulation identifies the premises underlying that approach. The majority below speculates the props may be "human experience," cf. Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972) (rejecting "the demonstrated facts of life" as support for gender lines in the law), and a "theory of equal benefit." 532 F.2d at 887. At least as likely, this approach, with its long, world-wide history, is rooted in familiar generalizations concerning the "natural" behavior, proclivities and preferences of the two sexes, in overbroad assumptions about "the way girls and women (or boys and men) are," generalizations and assumptions this Court has firmly rejected as a ground for legal regulation of the sexes. See Stanton v. Stanton, supra. Neither the record nor any source cited by the majority below supplies any factual basis for believing the goal of equal educational opportunity is fostered by keeping Susan Vorchheimer and her class out of a school that has no functional equivalent in terms of its tradition and close association with community leaders in all fields of endeavor.

II.

Judicial Enforcement of the 1974 Equal Educational Opportunities Act's Sex Segregation Ban, an Important Issue of Federal Law that Sharply Divided the Court Below, Merits Dispositive Adjudication by this Court.

In the Equal Educational Opportunities Act of 1974, Congress declared "all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . ." 20 U.S.C. §1701(a)(1). Congress found "the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws . . . ." 20 U.S.C. §1702(a)(1). And Congress outlawed school assignments that result "in a greater degree of segregation of students on the basis of . . . sex . . . ." 20 U.S.C. §1703(c). Further, Congress stipulated that assignments based on grade level or type of education, to conform to equal educational opportunity and equal protection laws, must not have as a purpose "segregating students on the basis of . . . sex . . . ." 20 U.S.C. §1705. In these clear words, Congress proscribed the very conduct at issue here.

Mandatory separation of students by sex in the only schools specially maintained for academically-gifted students surely does increase the degree of segregation on the basis of sex within the school system, precisely the practice prohibited by 20 U.S.C. §1703(c). And by reserving the Central facilities for boys, the Philadelphia School District surely does deny girls equal educational opportunity without regard to sex.

Discomforted by the plain meaning of the words Congress used, the majority below indulged in a tortured analysis of legislative non-history. It gleaned from the refusal of one Congress to deal with sex segregated schools, the intent of a later Congress to say one thing and mean another. Commenting on this mode of statutory construction,[13] Judge Gibbons, in his dissenting opinion, said:

> **The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control . . . interpretation of the words of**

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13 See United States v. Oregon, 366 U.S. 643, 648 (1961); Ex parte Collett, 337 U.S. 55, 61 (1949) (when the statutory language is clear, resort to legislative history to spy out a different meaning is inappropriate).

> **the ninety-third Congress . . . in 1974. Congressional silence, especially that of a different Congress, . . . can never be used to supercede the clear language of a statute. (532 F.2d at 891.)**

In summary, the Equal Educational Opportunities Act provides secure support, independent of the constitutional ground, for the judgment of the district court. The court of appeals majority reached a contrary conclusion only by ignoring the plain meaning of the words used in the Act and divining legislative intent in a manner that should attract this Court's firm disapprobation.

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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July, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT AND CAROL VORCHHEIMER, Guardians ad litem,
Plaintiffs-Appellees

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-791)

Argued October 31, 1975

Before: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Court of Customs and Patent Appeals* and WEIS, *Circuit Judge.*

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OPINION OF THE COURT

(Filed March 16, 1976)

WEIS, *Circuit Judge.*

Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal? This appeal presents those questions and, after careful consideration, we answer negatively. Accordingly, we vacate the district court's judgment which held that the school board policy was impermissible.[1]

Plaintiff is a teen-age girl who graduated with honors from a junior high school in Philadelphia. She then applied to Central High School, a public school in the city, but was refused admission because that institution is restricted to male students. After that setback, she filed this class action in the United States District Court seeking relief under 42 U.S.C. § 1983 from alleged unconstitutional discrimination. After a trial, the district court granted an injunction, ordering that she and other qualified female students be admitted to Central.

The Philadelphia School District offers four types of senior high schools: academic, comprehensive, technical and magnet. Although this suit is aimed at only an academic school, it is necessary to review the roles of other schools as well.

Comprehensive schools provide a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are in-

1. The district court's opinion is published at 400 F. Supp. 326 (E.D. Pa. 1975).

tellectually able to progress at a faster than average rate. The criterion for enrollment in the comprehensive schools is residency within a designated area. Although most of these schools are co-ed, two admit only males and one is restricted to female students. At the time the injunction was granted, plaintiff was enrolled at George Washington High School, a coeducational comprehensive school.

Academic high schools have high admission standards and offer only college preparatory courses. There are but two such schools in Philadelphia, and they accept students from the entire city rather than operating on a neighborhood basis. Central is restricted to males, and Girls High School, as the name implies, admits only females.

Central High School was founded in 1836 and has maintained a reputation for academic excellence. For some years before 1939, it was designated a comprehensive rather than an academic high school as it is presently. Its graduates both before and after 1939 have made notable contributions to the professions, business, government and academe.

Girls High has also achieved high academic standing. It was founded in 1848 and became an academic school in 1893. Its alumnae have compiled enviable records and have distinguished themselves in their chosen diverse fields. It now has a faculty of more than 100 and a student body of approximately 2,000, about the same as those of Central.

Enrollment at either school is voluntary and not by assignment. Only 7% of students in the city qualify under the stringent standards at these two schools, and it is conceded that plaintiff met the scholastic requirements of both. The Philadelphia school system does not have a co-ed academic school with similar scholastic requirements for admission.

The courses offered by the two schools are similar and of equal quality. The academic facilities are comparable, with the exception of those in the scientific field where Central's are superior. The district court concluded "that

[generally] the education available to the female students at Girls is comparable to that available to the male students at Central." Moreover, "[g]raduates of both Central and Girls High, as well as the other senior high schools of Philadelphia," have been and are accepted by the most prestigious universities.

The plaintiff has stipulated that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance." Moreover, she agrees that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." In addition to this stipulation, the defendants presented the testimony of Dr. J. Charles Jones, an expert in the field of education. Dr. Jones expressed a belief, based on his study of New Zealand's sex-segregated schools, that students in that educational environment had a higher regard for scholastic achievement and devoted more time to homework than those in co-ed institutions. The district judge commented that even had the parties not stipulated to the educational value of the practice, "this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement."[2]

Before deciding which school she wished to attend, the plaintiff visited a number of them and developed some definite opinions. As to Girls High, she commented "I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it." As to Central, she said, "I liked it there. I liked the atmosphere and also what I heard about it, about its academic excellence." She was somewhat dis-

2. 400 F. Supp. at 335. The defendants also relied on the testimony of Dr. M. Elizabeth Tidball who studied the educational background of those recognized in Who's Who of American Women. She found that the percentage of those listed was higher for graduates of women's colleges than for those of co-ed schools.

satisfied with her education at George Washington High School because of her belief that the standards which the teacher set for the students were not high enough.[3]

The trial judge found the gender based classification of students at the two schools to lack a "fair and substantial relationship to the School Board's legitimate interest" and enjoined the practice.

The court's factual finding that Girls and Central are academically and functionally equivalent establishes that the plaintiff's desire to attend Central is based on personal preference rather than being founded on an objective evaluation.

A fair summary of the parties' positions, therefore, is that:

1. the local school district has chosen to make available on a voluntary basis the time honored educational alternative of sexually-segregated high schools;
2. the schools for boys and girls are comparable in quality, academic standing, and prestige;
3. the plaintiff prefers to go to the boys' school because of its academic reputation and her personal reaction to Central. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury;
4. the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige.

With this factual background, we now turn to a review of the legal issues. We look first to federal statutory law to determine if it resolves the question raised here.

3. In an affidavit accompanying a Motion to Dissolve Stay Pending Appeal, the plaintiff stated that at the end of the eleventh grade at George Washington, she would qualify for early admission to college.

The financial assistance granted to educational institutions by the federal government has led to its ever-increasing influence in a field which in times past was considered the domain of state, local or private activity. It is not surprising that gender based admission standards have been the subject of Congressional deliberation.

In 1972 Congress provided that the benefits of educational programs funded through federal monies should be available to all persons without discrimination based on sex. 20 U.S.C. §§ 1681 *et seq.* The statute applies, however, to only specified types of educational institutions and excludes from its coverage the admission policies of secondary schools.[4] The bill which passed the House applied to all educational establishments and, if it had become law, would have required that all single-sex schools, primary and secondary, public and private, become coeducational.

However, the Senate proposal, which was the one enacted, eliminated these provisions for reasons which became apparent during debate on the measure. On the floor of the Senate, Senator Bayh offered an amendment to restrict the application of the Act. He explained:

> "As my colleagues know, a similar amendment on the House side was the center of some controversy because many felt that the admissions policies of too many schools were covered without sufficient study and debate. Because of the time pressures on the House side, long preparation was not possible. One result of the House approach is that all single-sex elementary and secondary institutions of education—both public and private—would be required to become coeducational. While this may be a desirable goal, no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the

4. Moreover, there is a specific exclusion of the admissions policies of public colleges which traditionally enrolled only students of one sex. 20 U.S.C. § 1681(a)(5).

> schools might argue for a continued single-sex status." 118 Cong. Rec. 5804 (February 28, 1972).
>
> • • •
>
> "In any event, I believe specific hearings are needed to answer these questions which had not been raised at the time of the 1970 hearings. Since there are also a number of high schools which are single sex, a similar study is needed on the question of requiring them to admit students of both sexes. I have been amazed to learn that the Office of Education does not even keep statistics on how many elementary and secondary schools—even public schools—are restricted in admissions to one sex. After these questions have been properly addressed, then Congress can make a fully informed decision on the question of which—if any—schools should be exempted." 118 Cong. Rec. at 5807 (February 28, 1972).

For further discussion *see* the Senate debate at 118 Cong. Rec. 5803-5815 (February 28, 1972). These narrowing provisions of the amendment became a part of the Act as it was finally passed by Congress. *See* 20 U.S.C. § 1681(a)(1)-(5).

During that same year, the House passed HB 13915 entitled "The Equal Educational Opportunities Act," legislation aimed against busing as a means of securing racial balance in schools. The original bill, which was referred to committee, contained no reference to discrimination based on sex, and the hearings were devoted to testimony on the busing issue. For reasons not explained in the committee report, the word "sex" was added in certain parts of the bill. The summary of the bill as it was reported out of committee included these comments:

> *"Section 2. Policy and purpose*
>
> Subsection (a) of this section declares it to be the policy of the United States that all public school chil-

dren are entitled to equal educational opportunity without regard to race, color, sex or national origin . . .

• • •

"*Section 3. Findings*

Subsection (a) contains a number of congressional findings:

(1) the maintenance of dual school systems where pupil assignments are made solely on the basis of race, color, sex, or national origin denies the equal protection of the laws." H. Rep. No. 92-1335, 92d Cong., 2d Sess., 9 (1972).

These provisions were eventually incorporated into the Act as passed by the House.

Facially, these sections conceivably could indicate a determination by the House that one-sex schools should not continue. However, a review of the House proceedings shows some unexplained and curious deviations between pertinent sections of the bill as described in the committee report and as actually reported out and finally passed. Representative Pucinski, a sponsor of the bill, presented the summary from the committee report on the floor of the House before debate began, including the following:

"*Section 201. Denial of equal educational opportunity prohibited*

"This section prohibits a State from denying equal educational opportunity to an individual on account of race, color, sex, or national origin by—

(1) deliberate segregation by educational agencies on the basis of race, color, *sex*, or national origin among or within the schools;

• • •

(5) transfer by educational agencies of students from one school to another if the purpose and effect is

to increase segregation of students on the basis of race, color, *sex*, or national origin . . . ." 118 Cong. Rec. 28837 (August 17, 1972). (Emphasis supplied)

Significantly, the word "sex" at the points we have italicized it in the text had already been deleted from the bill and in that form it passed the House and was sent to the Senate. An examination of the legislative history and record of debate affords no explanation for these important deletions. After extended debate in the Senate, the bill was defeated.

In 1974, during House debate on HR 69, a bill to extend and amend the Elementary and Secondary Education Act of 1965, Representative Esch, an advocate of the Equal Educational Opportunities Act of 1972, proposed an amendment identical in relevant portions with that Act. The amendment was adopted and HR 69, after modifications in the Senate not pertinent to our discussion, was enacted into law. 20 U.S.C. §§ 1701-1721.

The result is an anomaly. In an early part of the enactment, Congress finds that maintenance of dual school systems in which students are assigned solely on the basis of sex denies equal protection. 20 U.S.C. § 1702(a)(1). Despite that policy pronouncement, however, the statute does not prohibit the states from segregating schools on the basis of sex although there is a specific proscription on segregation based on race, color or national origin. 20 U.S.C. § 1703(a). Insofar, then, that the Equal Educational Opportunities Act of 1974 might have application to established single-sex schools, the legislation is at best ambiguous.

An explanation for the lack of clarity may be found in the context of congressional concerns at the time. The debates in the House and Senate, both in 1972 and in 1974, demonstrate that Congress was completely absorbed by the highly emotional issues generated by busing to achieve racial integration. Questions of constitutionality and policy as they applied to the busing problem pre-occupied

the speakers. Not once during the extended and heated discussions was there any reference to single-sex schools.[5]

An analysis of the statutory language, which recognizes the background to the legislative effort, is helpful. Congress' finding as to "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex . . ." should be read in the light of the policies followed by many communities to avoid racial integration. It is at least questionable that Philadelphia maintains a "dual school system" and the application of this phraseology to the case at bar is dubious.

The Act's policy declaration is that children are entitled to "equal educational opportunity" without regard to race, color, or sex. The finding of the district court discloses no inequality in opportunity for education between Central and Girls High Schools. We cannot, therefore, find that language applicable here.

Section 204(c), 20 U.S.C. §1703(c), is intelligible if read against the background of the busing controversy which spawned it. That subsection prohibits the assignment of a student to a school other than the one closest to his residence if the assignment results in a greater degree of segregation in the schools based on race, color, sex or national origin. The thrust is directed toward the "neighborhood school" concept, which was so much a part of the busing dispute, and against assignment of students to non-neighborhood schools to achieve segregation on any of the forbidden bases. We do not here face an attempt by a school board to assign "a student to a school other than the one closest to his or her place of residence within the district in which he or she resides . . .," 20 U.S.C. §1703(c).

5. At one point, Representative Anderson introduced a substitute for Mr. Esch's amendment which did not contain the word "sex." The amendment varied, however, in other points considered more significant at the time and was defeated, again without any suggestion that the deletion of discrimination on account of sex was a consideration. *See* 120 Cong. Rec. H 2165-2177 (March 26, 1974). It appears that the Anderson amendment was introduced as legislation more likely to be found constitutional than that proposed by Mr. Esch.

We conclude the legislation is so equivocal that it cannot control the issue in this case. Our research into the legislative history reveals no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives. That drastic step should require clear and unequivocal expression. Judicial zeal for identity of educational methodology should not lead us to presume that Congress would impose such limitations upon the nationwide teaching community by equivocation or innuendo. Congress spoke clearly enough on single-sex schools in 1972 when it chose to defer action in order to secure the data needed for an intelligent judgment. We do not believe that the ambiguous wording of the Equal Educational Opportunities Act of 1974 represented an abandonment of the clearly expressed desire to wait for more information before making a decision. Since no such data were produced, a realistic and, in our view, inescapable interpretation is that Congress deliberately chose not to act and to leave open the question of single-sex schools.[6] We thus have no need to consider the extent to which the legislative body may determine what activity constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970).

Finding no Congressional enactments which authoritatively address the problem, we must consider the constitutional issues which provided the impetus for issuance of the injunction.

The district court reviewed the line of recent cases dealing with sex discrimination, beginning with *Reed v. Reed*, 404 U.S. 71 (1971), and continuing through *Fron-*

6. In Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), Justice Brennan wrote:

"This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (citations omitted)

tiero v. Richardson, 411 U.S. 677 (1973); *Kahn v. Shevin,* 416 U.S. 351 (1974); *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), to *Stanton v. Stanton,* 421 U.S. 7 (1975). As a result of that analysis, the district judge reasoned that, while the Supreme Court has not held sex to be a suspect classification, a stricter standard than the rational relationship test applies and is denominated "fair and substantial relationship."

In each of the cases cited, however, there was an actual deprivation or loss of a benefit to a female which could not be obtained elsewhere. In *Reed v. Reed, supra,* the challenged statute would not permit a female to act as the administrator of an estate if a male qualified for the position. In *Frontiero, supra,* the female officer was deprived of a dependant's allowance which was not available elsewhere. *Stanton v. Stanton, supra,* rejected a statute which set a longer period of minority for payments in support of males than for females. *Kahn* and *Ballard,* by way of contrast, approved benefits to women for which men were not eligible. *See* Note, *The Emerging Bifurcated Standard for Classification Based on Sex,* 1975 DUKE L.J. 163.

In each instance where a statute was struck down, the rights of the respective sexes conflicted, and those of the female were found to be inadequate. None of the cases was concerned with a situation in which equal opportunity was extended to each sex or in which the restriction applied to both. And, significantly, none occurred in an educational setting.

The nature of the discrimination which the plaintiff alleges must be examined with care. She does not allege a deprivation of an education equal to that which the school board makes available to boys. Nor does she claim an exclusion from an academic school because of a quota system, *cf. Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974), or more stringent scholastic admission standards. *Cf. Bray v. Lee,* 337 F. Supp. 394 (D. Mass. 1972). Moreover, enrollment at the single-sex schools is applicable only to high schools and is voluntary, not mandatory. The plaintiff has difficulty in establishing discrimination in the school board's policy. If there are benefits or detriments inherent in the system, they fall on both sexes in equal measure.

Plaintiff cites *Sweatt v. Painter,* 339 U.S. 629 (1950), and *Brown v. Board of Education,* 347 U.S. 483 (1954), which prohibit racial segregation in the educational process. Those cases are inapplicable here. Race is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender.[7] We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law. As the Supreme Court has said: "[g]ender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin, supra* at 356 n.10.

Equal educational opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools. While this policy has

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7. The dissent's paraphrase of Plessy v. Ferguson, 163 U.S. 537, 544 (1896), is an imaginative argument contending, in essence, that sex is, like race, a suspect classification. That premise, while eloquently expressed, has not been accepted by the Supreme Court.

In *Frontiero,* a plurality treated sex as a suspect classification but a majority has not adopted that position despite several opportunities to do so.

In cases where the Equal Protection Clause is at issue, the state must prove a compelling interest to justify a suspect classification. Rarely can this be done. If only a rational relationship is the test, the state generally prevails. Reed v. Reed, *supra,* apparently establishes a test of "fair and substantial" relationship which falls between the two more traditional norms.

The Equal Protection Clause applies only to the states but in sex discrimination cases the Supreme Court has utilized, in an interchangeable fashion, the Due Process Clause of the Fifth Amendment to reach federal statutes or regulations. Hence, in this opinion we make no distinction between discrimination cases brought under the Fifth Amendment. *See* Weinberger v. Wiesenfeld, 420 U.S. at 638, n.2.

limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial.

The only occasion on which the Supreme Court ruled upon a gender classification in school admissions policy was in *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd*, 401 U.S. 951 (1971), a case which was decided many years after *Sweatt, supra*, and *Brown, supra*. *Williams* was a summary affirmance of a three-judge district court, and we do not have the benefit of the Supreme Court's reasoning. Yet, the result does have precedential weight for us. *Hicks v. Miranda*, 422 U.S. 332 (1975). The district court's opinion details a fact situation quite similar to that confronting us here, except that the plaintiffs were males who sought admission to a girls' state college. *Reed v. Reed, supra*, had not yet been decided and the district court therefore had no reason to discuss a substantial relationship test. Rather, it applied the traditional rational relationship guidelines. The court said:

> "While history and tradition alone may not support a discrimination, the Constitution does not require that a classification 'keep abreast of the latest' in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason." 316 F. Supp. at 137.

Believing the problem could not be considered in isolation, the court noted that the school involved was only one in an extensive state system which included several co-ed schools as well as an all male one.

We may not cavalierly disregard *Williams* although it predated *Reed* by a few months.[8] Indeed, the two cases are not inconsistent because the state schools' restrictive admissions policy applied to both sexes, a significant difference from the preferential statutory procedure in *Reed*.

8. Probable jurisdiction was noted in Reed v. Reed on March 1, 1971. Williams was affirmed on March 8, 1971.

This distinction is enough to justify the use of the rational relationship test in *Williams* even though it is likely that the result would have been the same under the substantial relationship formula.

We do not accept *Williams* as being inapplicable merely because males were barred rather than females, as in the case *sub judice*. We are aware of the suggestion that disparity is likely to be favorably considered when it confers on the female some benefit tending to rectify the effects of past discrimination. For example, in *Kahn v. Shevin, supra*, a widow's tax exemption was permissible although no such benefit was provided for a widower. *See also* 1975 DUKE L.J. 163, 179; Note, *The Supreme Court 1973 Term*, 88 HARV. L. REV. 129 (1974). But we have no such exempting qualification here because there is no evidence of past deprivation of educational opportunities for women in the Philadelphia School District. Indeed, the factual findings establish that, for many years past and at the present, excellent educational facilities have been and are available to both sexes.[9]

Since there is no remedial measure at stake, we see no basis for differentiation between *Williams* and the case at bar. Consequently, we differ with the district court's opinion that *Williams* has only a tenuous applicability here. In our view it is strong, if not controlling authority, for denial of an injunction.

The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a

9. This fact, in addition to others, distinguishes the case of Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.

We need not decide whether this case requires application of the rational or substantial relationship tests because, using either, the result is the same.[10] We conclude that the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution.

The gravamen of plaintiff's case is her desire to attend a specific school based on its particular appeal to her. She believes that the choice should not be denied her because of an educational policy with which she does not agree.

We are not unsympathetic with her desire to have an expanded freedom of choice, but its cost should not be overlooked. If she were to prevail, then all public single-sex schools would have to be abolished. The absence of these schools would stifle the ability of the local school board to continue with a respected educational methodology. It follows too that those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice. The existence of private schools is no more an answer to those people than it is to the plaintiff.

It is not for us to pass upon the wisdom of segregating boys and girls in high school. We are concerned not with the desirability of the practice but only its constitutionality. Once that threshold has been passed, it is the school board's responsibility to determine the best methods of accomplishing its mission.

The judgment of the district court will be reversed.

10. The district court said that "there can be little doubt" that under the rational relationship test the board's regulation would be constitutional.

GIBBONS, *Circuit Judge*, dissenting

The majority opinion may be briefly summarized as follows:

> The object of the [14th] Amendment was undoubtedly to enforce the . . . equality of the two [sexes] before the law, but in the nature of things it could not have been intended to abolish distinctions based upon [sex], or to enforce social, as distinguished from political equality, or a commingling of the two [sexes] upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact with each other do not necessarily imply the inferiority of either [sex] to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for [male] and [female] children, which has been held to be a valid exercise of the legislature power even by courts of States where the political rights of [women] have been longest and most earnestly enforced.

The quotation, with appropriate substitutions, will be recognized immediately as the analysis of Justice Brown, for the majority of the Supreme Court, in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). No doubt had the issue in this case been presented to the Court at any time from 1896 to 1954, a "separate but equal" analysis would have carried the day. I was under the distinct impression, however, that "separate but equal" analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over twenty years ago. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).[1] The majority opinion, in establishing a twentieth-

1. Chief Justice Warren, delivering the unanimous opinion of the Court, stated in pertinent part:

century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*.

But the resurrection of the "separate but equal" analysis is not my most serious quarrel with the majority opinion. What I find most disturbing is the majority's deliberate disregard of an express Congressional finding that the maintenance of dual school systems in which students are assigned to schools solely on the basis of sex violates the equal protection clause of the fourteenth amendment. § 203(a)(1), Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1702(a)(1) (Supp. 1976). So long as Congress has acted within the sphere of its legislative competence in making such a finding, I submit, we are not free to substitute a "separate but equal" legislative judgment of our own. Because I conclude that Congress has acted to prohibit the maintenance of single-sex public schools pursuant to its powers under § 5 of the fourteenth amendment, I dissent from the majority's substitution of a "separate but equal" legislative judgment. I would affirm the decision below.

I

Susan Vorchheimer, the named representative of the class bringing this action, was, when this case commenced, a tenth grade student at George Washington High School, a co-educational comprehensive, as distinguished from an academic, high school. Upon graduation with honors from Masterson School, an academic junior high school, Vorchheimer applied to Central High School, one of two senior academic high schools in the Philadelphia School District which limit their enrollment to scholastically superior students. Admission to Central High School is, and has been

1. (Cont'd.)
We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal . . . . 347 U.S. at 495.

since its founding in 1836, open to males only. The other senior academic high school is Philadelphia High School for Girls, which, as its name implies, admits only females. Vorchheimer is a scholastically superior student qualified to attend a school in which enrollment is limited to such students, and she chose to do so. But she chose to attend Central rather than Girls High because of Central's academic reputation and her favorable personal reaction to its atmosphere as compared with Girls and a number of other senior high schools she visited. Her application for admission to Central, however, was denied solely on the basis of sex. Having met the qualifications for an admission to an academic high school, she could be assigned either to Girls on the basis of her sex or to a non-academic high school within the district on the basis of her residence.

The majority opinion ironically emphasizes that Vorchheimer's choice of an academic high school was "voluntary". It was "voluntary", but only in the same sense that Mr. Plessy voluntarily chose to ride the train in Louisiana. The train Vorchheimer wants to ride is that of a rigorous academic program among her intellectual peers. Philadelphia, like the state of Louisiana in 1896, offers the service but only if Vorchheimer is willing to submit to segregation. Her choice, like Plessy's, is to submit to that segregation or refrain from availing herself of the service.

II

On August 21, 1974, Congress passed a series of amendments to the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.* One of these amendments was the Equal Educational Opportunities Act of 1974 (hereinafter E.E.O.A.), 20 U.S.C. §§ 1701-1758 (Supp. 1976). Section 202(a)(1) of this Act declared it to be the public policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin." 20

U.S.C. § 1701(a)(1). Had Congress stopped there one could argue, as the majority does, that a policy of "equal educational opportunity" does not preclude a "separate but equal" analysis, at least outside the racial context. But Congress went further. Relying specifically on the legislative authority conferred by § 5 of the fourteenth amendment, it made a series of legislative findings in § 203, the most important of which for the purpose of this appeal was that:

> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies those students the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. § 1702(a)(1).

We are thus confronted with an explicit legislative finding that the maintenance of a dual school system on the basis of sex violates the equal protection clause. Philadelphia operates such a system in its senior academic high schools. We need look no further than this legislative finding in order to find a violation for which 42 U.S.C. § 1983 provides a remedy. But Congress was not content, as the majority suggests, merely to assert broad legislative findings that might later prove to be inconsistent with or unrelated to its specific statutory scheme, for it defined in § 204 of the amendment a number of unlawful practices based on its findings. 20 U.S.C. § 1703.

Section 204 states in pertinent part that:

> No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by—
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . .

> sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student. 20 U.S.C. § 1703(c).

This subsection says that a pupil assignment system which results in increased segregation by sex, as well as race, color or national origin, over what would result in a neighborhood assignment system, is unlawful. At first blush Philadelphia may not appear to operate a neighborhood school assignment system, as that term is used in § 204(c), for its academic high schools since eligibility for enrollment at those schools is determined by scholastic excellence rather than residence within a designated area. The majority opinion contends that § 204(c) is inapplicable to the factual setting of this case because the "'neighborhood school' concept which was so much a part of the busing dispute" was not "an attempt to abolish single-sex schools." But this view fails to consider Congress' understanding of the meaning of neighborhood school assignment which is disclosed in another subsection of the E.E.O.A. Section 206, 20 U.S.C. § 1705, provides in pertinent part that:

> [T]he assignment by an educational agency of a student to the school nearest his place of residence *which provides the appropriate grade level and type of education* for such student is not a denial of equal educational opportunity or of equal protection of the laws *unless such assignment is for the purpose of segregating students* on the basis of . . . *sex* . . . . (emphasis added).

It is clear that this subsection must be read in conjunction with § 204(c), for it further clarifies and reenforces the meaning of that provision. Section 206 states that the lawful neighborhood assignment system outlined in § 204(c)

also includes the school nearest the student which provides the "appropriate grade level and type of education" unless assignment to that school is for the purpose of segregation on the basis of race, color, sex or national origin. Thus by assigning academically gifted students to Central or Girls on the basis of sex, the Philadelphia School Board assigns students in a manner which results in greater segregation of students by sex than if it assigned students solely on the basis of the nearest senior academic high school. The Philadelphia dual system for scholastically superior students not only falls within the legislative finding of the denial of equal protection of the laws, but is also a specified unlawful practice under § 204(c).

While I agree with the majority that the language of § 204(c) must be read with an appreciation of the heated debate over the school busing issue, I cannot agree that this contextual background justifies ignoring the plain language of both the legislative finding in § 203(a)(1) and the specified unlawful practice in § 204(c). Indeed, even in the remedial sections of the E.E.O.A., which are not applicable to the case *sub judice*, Congress has emphasized the prohibition of segregating public school students on the basis of sex. *See* § 216, 20 U.S.C. § 1715. If Congress was not talking about single-sex schools in the provisions quoted above, what was it talking about? A more blatant disregard of the plain meaning of ordinarily well understood words of our common language—"dual school systems", "sex", "assignment by an educational agency of a student to a school"—can hardly be imagined. We may not like what Congress has done in enacting this statute but we cannot, as the majority does simply ignore it. The statutory language of the E.E.O.A. convinces me that Congress did not inadvertently add the word "sex" to the list of prohibited bases for assigning public school students but included it in those subsections with the express objective of abolishing single-sex public schools.

Rather than discuss the statutory language of the E.E.O.A. the majority engages in an extensive analysis of what Congress did not say or do in enacting that statute. Focusing on what it alleges to be congressional silence on the issue of school assignment on the basis of sex during the hearings and debates on the E.E.O.A., the majority finds an ambiguity in the statute and concludes that "a realistic, and in our view, inescapable interpretation is that Congress deliberately chose not to act and to leave open the question of single-sex schools." This is certainly a novel use of legislative history, or more precisely, of legislative non-history as a tool for statutory construction. The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control this court's interpretation of the words the ninety-third Congress used in enacting the E.E.O.A. in 1974. Congressional silence, especially that of a different Congress, I submit, can never be used to supersede the otherwise clear language of a statute.

Moreover, the majority opinion relies on a misreading of the legislative history of the E.E.O.A. Judge Weis writes that at some point prior to its being passed by the House, §§ 201(a) and (e) of H.R. 13915, the Equal Educational Opportunities Act of 1972, included the word "sex" among the prohibited bases for segregating or transferring students respectively. The majority then asserts that the word "sex" was deleted from those sections without discussion and from this alleged congressional action draws support for its view that the 1974 legislation is equivocal and anomalous on the subject of single-sex schools. Apart from the issue of the relevance of this alleged action by a different Congress to the proper statutory construction of the plain language of § 204(c) of the E.E.O.A. in which the word "sex" is explicitly mentioned, the majority's description of the 1972 proceedings is inaccurate.

On March 20, 1972, Representative McCulloch speaking on behalf of Representatives Quie and Gerald Ford introduced the Equal Educational Opportunities Act of 1972. This bill was modelled in large part after President Nixon's proposals on schools and busing which were sent in a message to Congress on March 17, 1972.[2] At this stage H.R. 13915 did not mention sex in connection with the existence of dual school systems or the denial of equal educational opportunity. Only race, color and national origin were designated in the unlawful practices section as prohibited bases for segregating, assigning or transferring students. However, after 16 days of extensive hearings, the House Committee on Education and Labor reported an amended version of the McCulloch bill which included sex among the prohibited bases for assigning students in § 201(c) as well as in § 2(a)(1) of the policy and purpose section and § 3(a)(1) of the congressional findings section.[3]

A comparison of the language of the amended version of H.R. 13915 as it was reported out of the House Commit-

2. *See* 118 Cong. Rec. 8928-34 (1972).

3. I have found no discussion of why the word "sex" was added to these provisions in either the House hearings or the Committee Report accompanying H.R. 13915. *See* Hearings on H.R. 13915 Before the House Comm. on Educ. and Labor, 92d Cong., 2d Sess. (1972); H. Rep. No. 92-1335, 92d Cong., 2d Sess. (1972). But this is not to say that the Committee was unaware that it was linking sex with the maintenance or dual school systems and the denial of equal educational opportunity, for it warned in its report that:

> The provisions in the committee bill barring discrimination on the basis of sex are not meant to preclude separation of the sexes within schools for different courses, such as for gym classes. H. Rep. 92-1335, *supra* at 8.

This concern is reflected in the definition of segregation in Title V of H.R. 13915:

> The term "segregation" is defined to mean the operation of a school system in which students are wholly or essentially separated *among the schools* of an educational agency on the basis of race, color, *sex* or national origin or *within a school* on the basis of race, color, or national origin. (emphasis added).

Unlike the majority I believe that in 1972 the House of Representatives consciously intended to include the word "sex" in these sections. It should not be forgotten that it was the ninety-second Congress which finally approved the proposed Equal Rights Amendment before it was submitted to the states for ratification. Certainly if the majority is willing to rely on a contextual background in 1972 to assist in the interpretation of 1974 statutory language, it should at least recognize that after more than two years of extensive consideration of a specific constitutional ban on sex discrimination, Congress probably was not acting inadvertently in dealing with single-sex public schools.

tee on Education and Labor and read to the entire House prior to passage, with that of the original McCulloch bill as it was introduced, is provided in H.R. 13915, 92nd Cong. 2d Sess. (1972). Contrary to the majority opinion's position, this comparison reveals that the word "sex" was never included in §§ 201(a), (e) of the Equal Educational Opportunities Act of 1972. Some confusion, however, is created by Representative Pucinski's Section-by-Section Analysis of the Equal Educational Opportunities Act of 1972[4] in which he states that "sex" is included in §§ 201(a), (e). His analysis, however, does not correspond to the actual language of the Act. It is this unofficial version rather than the official language of H.R. 13915 which Judge Weis quotes in the majority opinion. The majority again engages in a novel and impermissible use of legislative history. Finding an unofficial version of the bill which conflicts with the language of the bill itself, the majority adopts the former for the sole purpose of advancing its argument that the House of Representatives was unclear regarding the objectives of H.R. 13915 in 1972 and that the entire Congress was unclear regarding the objectives of the E.E.O.A. when it passed that legislation in 1974. The majority's assertion, however, indicates only that either a particular congressman was confused about the language of H.R. 13915 in 1972 or that Congress inartfully drafted the E.E.O.A. in 1974 when it modelled that statute after the 1972 bill. If we were congressmen we might want to rewrite the E.E.O.A. to include sex in §§ 204(a) and (e). But as a court we must rely upon the language of the statute as written by Congress and resort to legislative history only to help clarify an ambiguity.

If there were some ambiguity regarding the applicability of § 204(c) to the facts of this case, and I believe none exists, the limited 1974 legislative history of the E.E.O.A. on this issue supports the interpretation I espoused above.

4. This section-by-section analysis is included in H. Rep. No. 92-1335, *supra* at 9-15, and reported as well in 18 Cong. Rec. 28836-38 (1972).

Because it was primarily an anti-busing amendment, the principal focus of the debate on the Esch amendment was on busing to achieve racial desegregation. Relative silence on the matter of sex discrimination is not surprising, since busing has not thus far been an issue in the sex discrimination context. But there was not, as the majority states, total silence on the subject of sex discrimination in the assignment of students. Congressman William Ford, a cosponsor of the Esch amendment, explained the proposal in these words:

> The amendment we now have before us would prohibit these types of [dual] school systems and it would prohibit the assignment of students to a school, based on race, color, *sex*, or national origin. 120 Cong. Rec. H 2161 (March 26, 1974) (emphasis added).

An alternative proposal to the Esch amendment was offered by Representative Anderson. This amendment, however, did not include sex among the prohibited bases for assignment of students.[5] But Congressman Anderson's proposal was rejected.[6] In view of this evidence we cannot assume, as the majority does, that Congress did not intend to prohibit the assignment of students on the basis of sex. Congress expressly added sex to the list of prohibited bases for student assignment and consistently refused to delete it.

In summary, some congressmen, reading the majority opinion, certainly will say, as Samuel Shellabarger said with reference to the Supreme Court's interpretation of the fourteenth amendment in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), and *United States v. Cruikshank*, 92 U.S. 542 (1876), that "many of the framers of these amendments received *information* regarding their intentions which was *new* . . . ."[7]

5. 120 Cong. Rec. H 2166 (March 26, 1974).

6. *Id.* at H 2177.

7. S. Shellabarger's Memorial Address on Chief Justice Morrison Waite, 126 U.S. 585, 600 (Appendix, 1888).

III

The wording of the E.E.O.A. strongly suggests, if it does not compel, the conclusion that it was drafted with an eye to *Katzenbach v. Morgan*, 384 U.S. 641 (1966).[8] Having found that the E.E.O.A. governs this case, we are squarely presented with the precise issue which, according to the majority, we have no need to consider—the extent to which Congress may determine what activity constitutes a violation of the equal protection clause of the fourteenth amendment. The starting point for the consideration of that issue is the text of § 5 itself:

> **The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.**

Is the legislative finding that pupil assignment by sex violates equal protection "appropriate legislation"? In answering that question we can set to one side two rather difficult problems. Certainly state action is involved when the Philadelphia School board makes pupil assignment decisions.[9] Thus we are not confronted with the question of the extent of congressional power to reach private action by legislation pursuant to § 5.[10] Nor are we confronted with an attempt by Congress to contract rights to equal protection already determined by the Supreme Court.[11] Congress eschewed any such attempt by concluding its

8. During the course of debate in the House in 1972 on H.R. 13915, Representative Pucinski, among others, argued that the bill was drafted on the basis of the authority granted in § 5 of the fourteenth amendment and defined by the Supreme Court in Katzenbach v. Morgan, *supra*, 118 Cong. Rec. 28835-36 (1972). *See generally* House Hearings on H.R. 13915.

9. *See, e.g.*, Brown v. Board of Education, *supra*.

10. *See* United States v. Guest, 383 U.S. 745 (1966); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353 (1964); Note, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, 55 Cal. L. Rev. 293 (1967). *Cf.* Communications Wkrs. of American T. & T. Co., L.L. Dept., 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3067 (U.S. June 19, 1975) (No. 74-1601).

11. *Compare, e.g.*, Katzenbach v. Morgan, *supra* at 667-68 (Harlan, J., dissenting) *with id.* at 651-52 n.10. *See* Developments—Congressional Power Under Section Five of the Fourteenth Amendment, 25 Stan. L. Rev. 885 (1973).

legislative findings in § 203 with the caveat "that the provisions of this chapter are not intended to modify or diminish the authority of the courts to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b). Here we are dealing only with a case in which, arguably, Congress has gone further in defining the substantive content of the equal protection clause than have the courts.[12]

I say arguably Congress has gone further than the courts, because at this point in the analysis I do not take a position as to the correctness of the majority's treatment of the sex discrimination cases. But for present purposes I am willing to assume that no case has definitely ruled that a sex based dual school system violates the equal protection clause. So assuming, analysis of the reach of congressional power under § 5 requires still a further refinement. We should distinguish between issues upon which the courts have not ruled, and issues on which the courts have previously rejected an equal protection challenge.

The majority opinion, pointing to *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (per curiam), assumes that the Court has rejected an equal protection challenge to a sex-based dual school system. I have serious reservations about the precedential value of the Court's summary affirmance in *Williams v. McNair*, since for all we know the Court's reasons for affirming the judgment of the three judge district court were other than those relied upon by that court in its opinion.[13] But setting aside those reservations, if *Williams v. McNair, supra*, means what the majority says it means, then this case is controlled by *Katzenbach v. Morgan, supra*.

In *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959), the Court rejected a fourteenth amendment chal-

12. Unlike race, color and national origin, sex has not yet been declared a suspect classification by the Supreme Court. *Compare, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin) *with* Frontiero v. Richardson, 411 U.S. 677 (1973) (only four justices deem sex a suspect classification).

13. *But see* Hicks v. Miranda, 422 U.S. 332 (1975).

lenge to the North Carolina English literacy requirement for the exercise of the franchise. In § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), Congress provided that no person who has successfully completed the sixth primary grade in a public school or accredited private school in Puerto Rico in a language other than English shall be denied the right to vote in any election because of his inability to read or write English. New York voters challenged the constitutionality of the congressional enactment in *Katzenbach v. Morgan, supra*. Justice Brennan wrote for the Court:

> We hold that, in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e). 384 U.S. at 646-47.

Thus Congress effectively determined that a state law violated the fourteenth amendment and set it aside even though the Supreme Court had previously rejected an identical challenge. On the authority of *Katzenbach v. Morgan, supra*, we must hold that the legislative findings in § 203(a)(1) and the prohibition in § 204(c) are proper exercises of the powers granted to Congress by § 5 of the fourteenth amendment, and that by force of the supremacy clause the Philadelphia sex based dual school system for academically gifted high school students cannot remain in operation.

The *Katzenbach v. Morgan* holding has spawned an extensive literature about the respective roles of the Court and Congress, and Congress and the States.[14] *Oregon v.*

14. Perhaps the most useful discussions are Cox, The Role of Congress in Constitutional Determinations, 40 U. Cin. L. Rev. 199 (1971), and Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966). Other instructive commentaries include Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amend-

Mitchell, 400 U.S. 112 (1970), in which there is no opinion of the Court and no majority consensus as to the reasons in support of its judgment, shows, at least, that just as with its commerce clause powers, the congressional powers under § 5 of the fourteenth amendment are not unlimited. One could imagine a congressional enactment of an equal protection standard striking down a state classification that is so arbitrary and unreasonable that the Court would reject it. But at the present stage of evolutionary development of our social institutions a court would be foolhardy indeed to suggest that congressional rejection of a state's gender based classification fell into that category.

Assuming, as the majority does, that *Williams v. McNair, supra*, is authority for a separate but equal treatment of the sexes in public education, one would still have to conclude that the legislative finding of § 203(a)(1) that separate is not equal for purposes of the fourteenth amendment has overruled it. Indeed, from an historical perspective, section 5 of the fourteenth amendment would have allowed Congress, had it possessed the decency and will, to overrule *Plessy v. Ferguson, supra*, at any time between 1896 and 1954. Had Congress done so, I suggest, it would have carried the Court along with it. There is much to be said, I submit, in favor of congressional initiative rather than judicial activism in the unfolding of the full meaning of the equal protection clause. When Congress, reflecting the democratic processes, concludes that a state classification is unlawful, its conclusion has the advantage of the authority that comes from democratic consensus, while at the same time its conclusion remains subject to judicial review. When the Court acts similarly there is neither the authority of consensus nor the safeguard of review by another branch. Thus the Court should, it would seem, be appropriately

14. (Cont'd.)
ments, 74 Colum. L. Rev. 449 (1974); Developments—Congressional Power Under Section Five of the Fourteenth Amendment, *supra* note 11; Note, Fourteenth Amendment Enforcement and Congressional Power to Abolish the States, *supra* note 11; Frantz, *supra* note 11.

deferential to state classifications, while acknowledging, as it did in *Katzenbach v. Morgan*, that Congress need not be deferential to the same degree. 384 U.S. at 651-56. Certainly Congress has a greater capacity than the Court to weigh the competing considerations. That is not to say, however, that when the Court has struck down a state classification the Congress may feel free to resurrect it. *Id.* at 651-52 n.10.

IV

Thus far I have assumed that *Williams v. McNair, supra*, was precedential to the same extent as *Lassiter v. Northampton Election Bd., supra*. If it is not, obviously the decision to defer to the Congressional legislative finding in § 203(a)(1) of the E.E.O.A. is far easier. The district court concluded, and I agree, that decisions subsequent to *Williams v. McNair, supra*, deprived it of any precedential value it may have otherwise had, and erected new standards for reviewing gender based classifications which were not satisfied in this case by the Philadelphia Board of Education. Certainly if *Williams v. McNair, supra*, is regarded as authority for the proposition that we review gender based classifications by the rational relationship standard, it has been seriously undermined by subsequent cases. *See, e.g., Stanton v. Stanton*, 421 U.S. 7 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). The majority says that this case does not require a decision regarding the applicable standard because the classification satisfies either the rational relationship or the substantial relationship test. The district court concluded, and, I agree, that since *Reed v. Reed, supra*, the rational relationship test is regarded by a majority of the court as inapplicable to gender based classifications.[15]

15. It must be acknowledged that the appropriate standard against which a disputed gender based classification should be measured as synthesized from Reed v. Reed, *supra*; Frontiero v. Richardson, *supra*; Kahn v. Shevin, *supra*; Geduldig v. Aiello, 417 U.S. 484 (1974); Schlesinger v. Ballard, 419 U.S. 498

Unlike the majority I find it particularly difficult to say on the basis of the record in this case that the exclusion of females from Central bears a fair and substantial relationship to any of the Philadelphia School Board's legitimate objectives. Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools. But certainly that observation does not satisfy the substantial relationship test. Some showing must be made that a single-sex academic high school policy advances the Board's objectives in a manner consistent with the requirements of the Equal Protection Clause. *Reed v. Reed, supra* at 76.

The Board, as the district court emphasized, did not present sufficient evidence that coeducation has an adverse effect upon a student's academic achievement. Indeed the Board could not seriously assert that argument in view of its policy of assigning the vast majority of its students to coeducational schools. Presumably any detrimental impact on a student's scholastic achievement attributable to coeducation would be as evident in Philadelphia's coeducational comprehensive schools which offer college preparatory courses as the Board suggests it would be in its exclusively academic high schools. Thus the Board's single-sex policy reflects a choice among educational techniques but not necessarily one substantially related to its stated educational objectives. One of those objectives, in fact, is to provide "educational options to students and their parents." (App. at 38a). The implementation of the Board's policy excluding females from Central actually

15. (Cont'd.)
(1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); and Stanton v. Stanton, *supra*, does not spring from the pages of United States Reports with immediate clarity. But certainly there appears to be a majority consensus against the mere rational relationship test. *See, e.g.*, Johnston, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. Rev. 617 (1974). *See also* Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-10 (1972).

precludes achievement of this objective because there is no option of a coeducational academic senior high school.

Because I agree with the district court that the Board has not made the required showing of a substantial relationship between its single-sex academic high school policy and its stated educational objectives, I would affirm the decision below even if I were willing to ignore the pertinent provisions of the E.E.O.A.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; guardians ad litem on her own behalf and on behalf of all others similarly situated

vs.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Appellants

(D.C. Civil No. 74-791)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, Circuit Judge and MARKEY,* Chief Judge Customs and Patent Appeals and WEIS, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court

*Sitting by designation.

for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 7, 1975, be, and the same is hereby reversed. Costs taxed against the appellees.

ATTEST:

/s/ Thomas Quinn
Clerk

March 16, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2005

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, Guardians ad litem,

Plaintiffs-Appellees

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Defendants-Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, Circuit Judges, and MARKEY, Chief Judge of the Court of Customs and Patent Appeals.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who con-

curred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Joseph F. Weis, Jr.
Judge

Dated: April 12, 1976

Judge Gibbons would grant rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, Guardians ad litem	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Newcomer, J. August 7th, 1975.

FINDINGS OF FACT

1. Plaintiff, Susan Lynn Vorchheimer, 15 years old, is a female citizen of the United States of America. She resides with her parents at 9721 Chapel Road, Philadelphia Pennsylvania. This suit is brought on her behalf by her parents, Bert and Carol Vorchheimer, as guardians ad litem.

2. Defendant School District of Pennsylvania is an agency of the Commonwealth of Pennsylvania which has the responsibility for carrying out the Commonwealth's program of public education in and for the City and County of Philadelphia.

3. Defendant Matthew W. Costanzo is the

Superintendent of Schools of the School District of Philadelphia and is sued in his official capacity.

4. In November of 1973, while plaintiff was a ninth grade student at the J. R. Masterman School, a junior high school, plaintiff's parents received a communication from Masterman's principal concerning the various types of senior high schools available to their daughter.

5. This communication listed four types of senior high schools: comprehensive, technical, academic, and "magnet". The two high schools listed under the academic category were Philadelphia High School for Girls and Central High School.

6. This communication stated that "there are specific requirements for admission to [the academic] schools". The communication described these requirements as:

> "Tests - to be fully qualified a pupil must present a minimum score of 82 percentile, national composite score in the most recent Iowa Tests.
>
> Achievement - Must present a record of all "A's" and "B's" with not more than one "C" in any major subject for a full year prior to admission. Marks considered are those from the previous June together with those on the second and subsequent reports of the current school year."

7. Central High School and Girls High (Philadelphia High School for Girls) are the only two academic schools within the Philadelphia School District. These two schools are the only high schools in the Philadelphia School District which draw their student bodies from the entire city. Only 7% of the students in the entire Philadelphia School District are able to meet Central and Girls High admission standards.

8. Both Central and Girls are single sex schools, Central's student body being exclusively male and Girls exclusively female. This segregation by sex has continued, with brief exceptions, since the founding of the two schools and represents the official policy of the Philadelphia School Board.

9. Admission to a comprehensive senior high school is normally based upon a student's residence, i.e., students usually attend the comprehensive high school located in their neighborhood.

10. During December, 1973 and January, 1974, Susan Vorchheimer visited a number of senior high schools in the Philadelphia School District. One school which she visited was George Washington High School, a comprehensive high school which is located in her neighborhood. She also visited Central High School and Girls High.

11. Based on her observations during these visits, and on her past experience in

Philadelphia's public schools, plaintiff decided that she wished to attend Central High School. She rejected the idea of attending Girls High School because, in her words:

> "I...visited Girls and sat in on one of the classes and walked around and I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it."

12. On or about January 11, 1974, plaintiff's father submitted on her behalf an application for admission to Central High School for the following year, which application was in accordance with the procedural requirements of defendants' school system. It is undisputed that plaintiff met Central's academic admission requirements.

13. Masterman School is, like Central and Girls, an academic school. It requires that prospective students meet certain admission criteria before they can be admitted. However, Masterman School only offers instruction through the ninth grade.

14. Upon graduating from Masterman, plaintiff received six awards; the award in English, history, science, and geometry, the American Legion award for citizenship and scholarship, and the most outstanding student award.

15. On or about February 1, 1974,

plaintiff's application for admission to Central High School was rejected solely on the basis of her sex.

16. Plaintiff is currently in the tenth grade at George Washington High School. Her motivation to achieve good grades has declined, due in part to plaintiff's perception that her teachers expect and demand less work than was expected or demanded at Masterman. Consequently, her grade performance has slipped from its previous level at Masterman.

17. Central High School was founded in 1836 as the first public high school in Philadelphia and the second public high school in the United States. Beginning as a small academic high school with a faculty of four and a student body of 63, Central has consistently maintained a reputation for academic excellence even though it temporarily changed from an academic to a comprehensive high school with an enrollment of 4,000 students around the beginning of the twentieth century. During the nineteenth century members of its faculty were nationally known physicists and English stylists. Its graduates have risen to the top of the business world, the professions, politics, and academia. In February, 1939, after various revisions in its curriculum, Central resumed its original character as an academic high school and opened its new building with 41 faculty members and 1,250 students. At the present time Central has a faculty of over 100 and an enrollment of nearly 2,000.

18. Girls High was organized as an academic high school for females in 1893, having evolved from a school established in 1848 whose primary purpose was to train teachers for the Philadelphia public schools. While the school began by offering commercial, teacher training, and college-preparatory courses, the college-preparatory curriculum quickly overshadowed the other two. By 1910, Girls High was exclusively college preparatory. It has fulfilled the vision of many nineteenth century educators, both men and women, by becoming the equal of Central in preparing its students for college.

19. Many men who are currently prominent in the professional, political, and cultural life of this city and state are graduates of Central. Central has a deserved reputation for training men who will become local and national leaders in all fields of endeavor.

20. Central's academic standing and its reputation as a training ground for community leaders has attracted the attention of national leaders throughout Central's history. In 1842 President Polk visited the school. In 1902 President Theodore Roosevelt visited the school to make a speech in which he told Central's students "Don't flinch, don't foul, and hit the hard line." More recently, then Attorney General Robert Kennedy addressed Central's Alumni Association and 200 student leaders in 1964, and then Vice-President Hubert Humphrey received an award

at the school in 1966. The visits of the latter two men were arranged through the auspices of the Barnwell Foundation, which was established by a Central alumnus.

21. The Alumni Association of Central High School is an influential group in Philadelphia, both because of its activities as a group and the individual positions held by its members.

22. The dedication and loyalty of Central's alumni, whether measured by financial contributions or day-to-day participation in matters related to the school, equals the loyalty of many college alumni to their alma mater.

23. While the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central, Girls has had a large number of graduates of note in these fields. Among the current community leaders who have graduated from Girls are three judges of the Court of Common Pleas of Philadelphia and the first vice-president of the American Medical Association.

24. The admissions standards of Girls High School are comparable of those of Central High.

25. Graduates of both Central and Girls High, as well as the other senior high schools

of Philadelphia, have been and are accepted for matriculation by the best and most prestigious colleges and universities.

26. With the exception of scientific facilities, in which Central is superior, the academic facilities of Central and Girls High are comparable.

27. The courses offered at Girls are similar and of equal quality to those offered at Central.

28. Central High is the only high school in Philadelphia with a substantial private endowment. However, there is no evidence that as a result of this endowment Central's facilities, faculty, or course of instruction is superior to Girls.

29. Both Central and Girls have fewer students than they are physically capable of handling. This is in stark contrast to most of the remaining senior high schools, which are substantially overcrowded.

30. In general, it can be concluded that the education available to the female students at Girls is comparable to that available to the male students at Central.

31. Central and Girls are not the only two single-sex schools in the Philadelphia School District. The Edison High School and the Benjamin Franklin High School admit only males and the Kensington High School admits

only females. All three of these schools are comprehensive high schools, which means that they draw their students from the surrounding neighborhood.

32. The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance.

33. There are educators who regard education in a single-sex school as a natural and reasonable educational approach.

34. Dr. M. Elizabeth Tidball, a Professor of Physiology at George Washington University, compared the relative career successfulness, as measured by inclusion in Who's Who of American Women, of women graduates of coed colleges and all women's colleges. She first found that the percentage of women graduating from women's colleges who were later listed in Who's Who was two to three times greater than the percentage of women so listed who were graduates of coeducational institutions. This approximate ratio was constant throughout each decade from the 1910's to the 1950's as well as for the total of all these years.

35. Dr. Tidball's further breakdown of her comparison revealed a direct and positive relationship between the number of women who became career-successful (as defined by Dr. Tidball) following graduation from their school and the number of women faculty present in that school's environment at the time

the woman was a student there. Her study also revealed a direct, negative relationship between the number of men students present at a college and the number of women "achievers" graduating from the institution.

36. Dr. Tidball found no statistical correlation between the number of men faculty present at a college and the number of women achievers graduating from that institution.

37. There were a greater number of women faculty per women students at the women's colleges studied by Dr. Tidball than at the coed institutions she studied.

38. Dr. Tidball testified that it would not be unreasonable to apply her findings to the secondary level, including academic high schools, since neither she nor anyone else had been able to refute her findings as they applied to the college level.

One factor, however, which mitigates against the applicability of Dr. Tidball's study to students at Central or Girls is the lack of information concerning the academic caliber of the single-sex and coed colleges compared in the study. Dr. Tidball merely selected, at random, a total of 1500 women from three editions of Who's Who of American Women. Of these women, 1100 had graduated from college. Dr. Tidball then obtained data on student enrollment, graduates, and faculty composition for the 59 women's colleges and 289 coeducational colleges and

universities attended by the 1100 subjects. While the fact that these institutions graduated women who later appeared in Who's Who might tend to establish these schools as academically superior, Dr. Tidball made no attempt to quantitatively measure the academic achievement of their students.

39. Dr. J. Charles Jones, a Professor of Education at Bucknell University, testified concerning an article which he wrote in conjunction with two other scholars entitled "Coeducation and Adolescent Values". This article was a summary of research conducted on the subject of attitudes among New Zealand secondary students towards school and schoolwork, extracurricular activities, and the approval of their parents and peers.

40. Dr. Jones' study included 1,255 students in their third and fourth years of secondary school in Wellington, New Zealand. Of these students 697 were males, 455 enrolled in an all-boys' school and 242 in a coeducational school. The total of 528 females was divided between 364 in an all-girls' school and 164 in the same coeducational secondary school.

The three schools were similar with respect to curriculum organization, degree of student regimentation, the requirement that all students wear school uniforms, and instructional methods. In Wellington, a small proportion of students elect to attend schools outside their assigned district. However, the large majority attend a particular school because it is in their zone. The girls' school in this study, for example,

drew less than 10% of its students from outside its zone.

This pattern of attending the school in one's district was probably accentuated by the fact that instructional programs, whether in single-sex or coeducational schools, were virtually indistinguishable from one another.

All programs were traditional university preparatory curriculum and all were based on syllabi determined by the demands placed upon the schools by the national public examinations for graduation and university entrance.

The study's authors concluded: "While it was not possible to assign students randomly to single-sex or coeducational schools, the above factors, taken in conjunction with the generally egalitarian nature of New Zealand society, suggest that the three groups probably did not differ markedly from one another in background or motivation upon entry into secondary school."

41. Dr. Jones asked certain questions of students at both the single-sex and coed high schools. The questions arguably relevant to the matter before us were:

i. "How much time, on the average, do you spend doing homework outside school?"

ii. "Suppose you had an extra hour of school, how would you use it?"

iii. "If you could be remembered here at school for one of the three things listed below (brilliant student; leader in activities; most popular), which one would you want it to be?"

42. The Jones study found statistically significant difference between the answers of single-sex students, both boys and girls, and those of coed students to question no. i, supra, concerning amount of time spent on homework. 38% of the coed boys reported spending, on the average, between 1 1/2 and 3 hours per day on homework. Over 55% of the boys attending the all-boys school reported averaging this much time. While differences between the two groups of girls were not as great, they were statistically significant. 55% of the girls at the all-girls school spent 1 1/2 to 3 or more hours per day on homework, while 44.6% of the coed girls reported spending this much time.

43. When asked how they would spend a free hour in school if given a free choice, question No. ii, supra, coed boys differed from boys attending the all-boys' school to a statistically significant degree. 16% of the coed boys stated that they would spend this hour studying, while 26.8% of the other group indicated studying as their first choice. The differences between coed girls and girls attending the all-girls' school were even greater. Nearly 32% of those attending the girls' school would spend the time studying, as opposed to 12.2% of the coed girls who

would spend the time this way.

44. When asked how they would best like to be remembered at their school, as brilliant students, leaders in activities, or as the most popular, question No. iii, supra, the coed boys distributed their choices rather uniformly across the three categories while a majority of the boys at the all-boys' school chose being remembered as a brilliant student or a leader in activities. There were however, no statistically significant differences between the two groups of boys. The girls, on the other hand, did differ significantly, with 41% of the girls at the all girls' school preferring to be remembered as a brilliant student as compared to 25.9% of the coed girls making this choice, and 34.2% of the coed girls wishing to be remembered as "most popular" while 19.4% of the students at the all-girls' school wished to be remembered for this reason.

45. Concerning the applicability of his study to American secondary students, Dr. Jones testified that it would be "almost impossible" to obtain comparable control groups of coed and single-sex students, since most of the American single-sex schools are "either for superior students rather than for [a] random sampling of students, or they are church-related schools, or they are private schools where one probably could expect that they came from a particular socioeconomic strata." (Tr., p. 161) (emphasis supplied). Due to this discrepancy between the New Zealand and the American single-sex secondary

schools, Dr. Jones was reluctant to apply the conclusions of the New Zealand study to American single-sex schools for academically superior students.

46. The Jones study does not indicate that the single-sex character of a school results in better citizenship, or the development of cognitive skills. Nor does it indicate that spending more time on homework will result in greater academic achievement, since the academic achievement of the New Zealand students on standarized tests was not measured, nor was any gauge made as to any improvement on such tests from pre-high school to graduation. The Jones study merely demonstrates that, on the average, the single-sex students of both sexes who were questioned have a higher regard for scholastic achievement than do the coed students, and that they are more likely on the average to spend more time at homework than the coed students.

47. While the varying amounts of time which the two groups dedicate to homework may indicate a difference in motivation, there may be other factors which explain this difference, and this fact alone does not establish a difference in achievement levels between the students in the different types of schools.

48. The general purposes of the Philadelphia school system are to produce good and constructive citizens, who are literate in every sense, and who are able to communicate

effectively. In addition, there is a general goal to teach students saleable skills. (Constanzo deposition, page 4, lines 16-24).

49. The specific goals of defendants' school system are as follows:

i. increasing the efficiency and basic skills of the students;

ii. providing an extensive network of early childhood programming "with the accent on prevention versus cure" (Costanzo Deposition, page 3, line 25);

iii. providing special education programs which would address themselves to the needs of physically, mentally, and emotionally handicapped children;

iv. providing career education whereby students would be introduced to the world of work and would progressively be provided with more in-depth work experience;

v. providing educational options to students and their parents.

50. Defendants have no independent interest in the number of hours a student spends on homework nightly. Defendants' only interest in the length of time a student, male or female, spends on homework is the effect which it may have on that student's academic performance in school.

51. Although the comprehensive high schools offer some courses similar to those taught at Central or Girls, no other high school in Philadelphia offers the range of courses available at Central or Girls, nor do they have a student body selected solely on the basis of academic performance.

The disparity between the student bodies of the academic high schools and the other high schools is demonstrated by their varying performances on the California Achievement Test, which purports to measure a student's reading ability. No Central or Girls students ranked below the 16th percentile on this test. The next lowest ranking in this percentile was made by the students at Northeast High, with 8% in this percentile; 13% of the students at George Washington High, which plaintiff attends, fell in this percentile. Conversely, 51% of Central's and 43% of Girls' students scored in the 85th and above percentile, while only 20% of the students at Northeast and 16% of the students at Washington came within this category.

For these reasons and because of their academic tradition and self-esteem, Central and Girls offer their students an experience which is more intensely intellectual and a better preparation for the atmosphere of a good liberal arts college than is offered by any of the non-academic high schools. Thus a student seeking this kind of public education in Philadelphia does not

have the choice of attending a coed school, but must attend a school of only his or her own sex.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over plaintiff's [sic] jurisdiction over plaintiff's federal claim by reason of Title 42 U.S.C. §1983 and 28 U.S.C. §1343.

2. This Court declines to accept pendant jurisdiction over plaintiff's claim under Pennsylvania's Equal Rights Amendment, (Article 1, Section 28 of the Pennsylvania Constitution), since standards governing the applicability of this amendment in the educational field have not been clearly established by the state courts. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Samuel v. The University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974).

3. This suit is a proper class action under Federal Rule 23 (b)(2). Plaintiff is therefore certified pursuant to that subsection as the representative of all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex.

4. Plaintiff has been denied admission to Central solely because of her sex.

5. Defendants have failed to show that their policy of excluding females from Central

bears a "fair and substantial relationship" to any of their legitimate objectives. Reed v. Reed, 401 U.S. 71, 76 (1971). The analysis performed by Dr. Tidball does not show that males who attend a single-sex school are more likely to be career achievers than those who attend coed schools. It is extremely doubtful that Dr. Tidball's conclusions concerning the correlation between all-women's colleges and career successful women can be applied to women at an academic high school such as Central. Moreover, fostering career successful women is not one of defendants' objectives in excluding women from Central.

Dr. Jones' study also appears to be inapplicable to academic performance at an institution such as Central. Furthermore, defendants failed to affirmatively connect the Jones study findings to any of their educational objectives.

Nor does the record bear out defendant's assertion that maintaining Central as an all-male school promotes educational alternatives. Since a female (or male) student who wishes to attend an academic high school can only attend a single-sex institution, defendant does not provide alternatives at this level.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; Guardians ad litem on her behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

MEMORANDUM AND ORDER

Newcomer, J. August , 1975.

This suit is brought by a young woman, Susan Vorchheimer, through her parents against the School Board of Philadelphia and the Superintendent of Philadelphia's public schools, Matthew Constanzo. The young woman seeks admission to Central High School, one of two senior high schools in Philadelphia which limit their enrollment to academically superior students. Admission to Central High School is, as it has been since the school's founding in 1836, available to males only; consequently, Susan Vorchheimer's application to Central was turned down. The parties have stipulated that were Susan Vorchheimer a boy, she would have qualified for admission to

Central.

Plaintiff decided not to attend the Philadelphia High School for Girls, Philadelphia's other senior high school for academically superior students, which is all female. She is presently attending George Washington High School, a coed, non-exclusively academic high school located in her neighborhood. At the time she brought this suit she had just graduated from the ninth grade; at the present time she has completed the tenth grade.

The legal questions which this case raises are far more complex than the factual ones, and among the legal questions the question of which standard the Court should use to review the School Board's action is by far the most complex. There can be little doubt, for example, that we are faced with a classification which is based on sex; likewise, the fact that the education available at Girls is substantially equal to that available at Central takes this case out of the realm of Brown v. Board of Education,[1] 347 U.S. 483

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1. We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a constitutional deprivation. While the sociological evidence which underlay Brown's finding of inferiority has not been free from challenge, there is no evidence in the present case that such a feeling of inferiority exists.

(1954). In fact, the outcome of this case depends on which standard of review is applied.

If this case had been brought ten years ago, or perhaps even five, the only precedent to which a court could look would have sanctioned a gender-based classification as long as it was rationally related to some legitimate state interest. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948). These cases not only applied the traditionally permissive "rational relationship" standard to sexual classification but also exhibited the Court's willingness to hypothesize rational relationships on the basis of generalizations which lacked any factual support in the record. In upholding a statute which required women to affirmatively indicate their desire for jury service before they could be picked as jurors, the Court in Hoyt stated:

> "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissable for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." 368 U.S. at 61-62.

In Goesaert, the Court considered a challenge to a Michigan statute which prohibited all women from being licensed as bartenders except for the wife or daughter of the male owner of a licensed liquor establishment. The challenger claimed that it was arbitrary for Michigan to forbid females generally from being barmaids while at the same time excepting the relatives of male tavern owners. The Court first noted that "Michigan could, beyond question, forbid all women from working behind a bar", despite the "vast changes in the social and legal position of women." 335 U.S. 465-466. This was so, the Court said, because:

> "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. at 466.

The Court upheld the distinction drawn between women generally and owners' wives and daughters as "not without a basis in reason..." 335 U.S. at 467.

The Court's willingness to uphold legislative restrictions on women in the name of protecting their health or morals was part of its general deference to the legislature in social welfare matters. The minimal "rational relationship" test used by the Court in reviewing disparate treatment of the sexes was the same test it used to review commercial or social welfare legislation which did

not infringe some right deemed "fundamental" or which did not classify persons according to such "suspect" categories as race, religion, or national origin. See, generally, Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-10. Under this test, a state has a wide scope of discretion in enacting laws which affect some group of citizens differently than others. As the Supreme Court has stated:

> "The [equal protection] safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

The Court has emphasized the degree of deference which it will extend to state legislation under the "rational relationship" test in even more forceful terms:

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are

> otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. McDonald v. Board of Election Comm'rs., 394 U.S. 802, 809 (1969) (Emphasis Added).

There can be little doubt that under this standard the School Board's policy of maintaining Central as an all-boys' school would pass constitutional muster. Most likely plaintiff's stipulation that "the practice of educating the sexes separately is a technique that has a long history and worldwide acceptance" or that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach" would have proven fatal to her case. Even if this were not so, this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement. However, since the time of the "rational relationship" cases mentioned above, the Supreme Court has made a number of rulings in the equal protection area, the common threads of which are unclear, but the net effect of which has been to take classifications based on sex out of the province of the "rational relationship" standard and to place them in a new and unchartered territory, possibly uninhabited by any other classification.

The first of these cases was Reed v.

Reed, 404 U.S. 71 (1971). Reed involved the appeal of the adoptive mother of a decedent who had lost the right to administer the estate to the adoptive father due to a state statute requiring that in appointing administrators the probate court was to favor men over women of the same degree of kinship. A unanimous Court declared the statute violative of the equal protection clause. The grounds for this decision were ambiguously set forth in Chief Justice Burger's brief opinion. While it declared that a statute which discriminated on the basis of sex "establishes a classification subject to scrutiny under the Equal Protection Clause", 404 U.S. at 75, it did not, at least expressly, apply the "strict scrutiny" standard, under which a classification will be upheld only if necessary to achieve a compelling state interest. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U. S. 618 (1969). Rather, the Court articulated a somewhat more elaborate rational relationship standard to govern the controversy before it:

> "The Equal Protection Clause...den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all

persons similarly circumstanced are treated alike." F.S. Royster v. Guano Co. v. Virginia,[2] 253 U.S. 412, 415 (1920). 404 U.S. at 75-76.

The Court found "not without some legitimacy" the state's objective of eliminating the necessity for time-consuming hearings to resolve disputes as to which applicant would be a better qualified administrator, but declared that to prefer males over females "merely to accomplish the elimination of hearings on the merits is to make the very kind of arbitrary choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." 404 U.S. at 76.

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2. In Royster the Supreme Court struck down a Virginia corporate income tax law which exempted domestic corporations which conducted no business within Virginia from a tax on domestic corporations' out-of-state income. The Court stated that "no ground is suggested, nor can we conceive of any, sustaining this exemption..." 253 U.S. at 416. Justices Brandeis and Holmes dissented on the grounds that the exemption was not clearly unreasonable nor arbitrary. Although the majority opinion used the "fair and substantial relationship" language cited in Reed, the language quoted above seems to indicate the Court was applying the traditional "rational relationship" test.

The description of the gender classification as "arbitrary" in spite of the fact that it obviously furthers the state's "legitimate" objective of more efficient probate administration gave impetus to the assumption that, in dealing with future sexual classifications, the court would apply a more rigorous standard of review than the rational relationship standard. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 (9th Cir. 1974); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Green v. Waterford Board of Education, 473 F. 2d 629, 631 (5th Cir. 1973); Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 21 (1972).[3] This assumption was

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3. In this well-reasoned and well-written article, the development of this standard was viewed as signalling the possible abandonment of the rigid two-tiered equal protection analysis employed by the Warren Court in exchange for a "means-oriented" equal protection standard applicable to all save racial or other formerly "suspect" classifications. Gunther, cited supra, at 20-25. However, as the author himself notes, Id. at 33-34, the applicability of this standard to Reed is problematic, since in Reed the Court, in effect, held that a legitimate state interest was not compelling enough to justify the challenged classification. "It

(Continued)

reinforced by the fact that the Court refused to follow the reasoning of the Idaho Supreme Court, which had upheld the statute on the grounds that the legislature could reasonably have concluded that men were generally more able to administrate estates than were women, and thus that the classification furthered the state objective of securing the more able administrator. Reed made clear that the Supreme Court would no longer generalize about the relative incompetence of women in order to uphold sexually discriminatory classifications. However, the fact that the Court never even discussed this justification left open the question of whether such generalizations were no longer acceptable, or merely whether they would not be accepted without supporting factual evidence.

The latter interpretation was adopted by several lower courts following Reed. These courts articulated a "strict rationality" or "intermediate" standard of review, under which the government would be required "to produce evidence that the challenged classification furthers the central purpose of the classifier." Berkelman v. San Francisco Uni-

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3. (Continued)
is difficult to understand [the Reed] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis." Gunther, cited supra, at 34.

fied School District, supra, at 1269.

In Frontiero v. Richardson, 411 U.S. 677, (1973) decided two years after Reed, the Supreme Court dealt with sex discrimination in a manner apparently inconsistent with Reed. In Frontiero, an Air Force officer attempted to claim her husband as a dependent in order to obtain housing, medical, and other fringe benefits of the service. She was denied these benefits under a statute which required female military personnel to prove that their husbands actually depended on them for at least half of their support while male personnel were not required to prove any actual dependency. The Supreme Court struck down this statute. The plurality opinion, written by Justice Brennan and joined in by Justices Douglas, White and Marshall, found sex to be a "suspect" classification, which could be justified only if necessary to accomplish some compelling state interest. The plurality opinion found that the government had failed to show any rational relationship, let alone a necessary one, to their claimed interest in saving money, and declared that the state's interest in administrative efficiency was insufficiently compelling to justify the suspect classification. Four Justices concurred, on the basis of Reed. Justice Rehnquist dissented.

Justice Brennan's explanation of why sexual classifications should be constitutionally suspect was lucid and compelling.

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage...Throughout much of the 19th Century the position of women in our society was, in many respects comparable to that of Blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kantowitz, Women and the Law; The Unfinished Revolution, 5-6 (1969); G. Myrdal, An American Dilemma, 1073 (2d ed. 1962). And although Blacks were guaranteed the right to vote in 1870, women were denied even that right - which is itself "preservative of other basic civil and political rights" - until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most

conspicuously, in the political arena. See generally, K. Amundsen, The Silenced Majority: Women and American Democracy (1971); the President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice. (1970)" 411 U.S. at 684-686.

The concurring opinions, one by Justice Powell in which the Chief Justice and Justice Blackmun joined, the other, a single sentence long, by Justice Stewart, did not directly meet any of these arguments. Instead, Justice Powell argued that Reed offered ample support for the Court's result and that the Court should await the passage of the Equal Rights Amendment before it declared sex a suspect classification. Justice Stewart's concurrence, citing Reed, merely stated that the statutes under attack "worked an invidious discrimination in violation of the Constitution." 411 U.S. at 691.

In Kahn v. Shevin, 416 U.S. 351 (1974) and Schlesinger v. Ballard, U.S. , 42 L.Ed. 2d 610 (1975), the Court demonstrated that the standard of review was still an unresolved matter in the sexual classification area. In Kahn, the Court upheld a Florida statute granting widows[4] a $500 ex-

4. The statute granted a similar exemption to every bona fide Florida resident who had lost a limb or been disabled in war or military hostilities or by misfortune.

emption from ad valorem property taxation against the constitutional challenge of a widower denied a similar exemption. The Court noted United States Department of Labor statistics establishing the continuing disparity between the earnings of men and women in the labor market. The Court then declared that while the widower can usually continue the occupation which preceded his spouse's death, "in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar and in which, because of her former economic dependency, she will have fewer skills to offer." 416 U.S. at 354. The Court continued:

> "We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." 416 U.S. at 355.

The Court found that, in light of the disparate economic status of widows and widowers, their differing treatment under the Florida statute "rests upon some ground of difference having a fair and substantial relation to the object of the legislation." 416 U.S. at 355, quoting Reed v. Reed, 404 U.S. 71, 76.

The Court's opinion in Kahn was written by Justice Douglas, who had joined in the plurality opinion in Frontiero declaring sex to be a suspect classification. The other

Justices who had joined in that opinion all dissented in Kahn, principally on the grounds that the statute was not narrowly enough drawn to withstand strict scrutiny. In response to these dissents, Justice Douglas stated that "the dissent would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated". He then declared:

> "Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services. [citation omitted]..." 416 U.S. at 356.

In Schlesinger v. Ballard, cited supra, the Court upheld a statute providing for the mandatory discharge of a naval officer after twice failing to be promoted above the grade of lieutenant even though a related statute permitted a female officer of the same grade to remain in the service for thirteen years before she could be discharged for want of promotion. Plaintiff was a male officer who had been discharged pursuant to the statute applicable to men. The Court distinguished Reed and Frontiero as follows:

> "In both Reed and Frontiero the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In Reed, the assumption underlying the Idaho statute was that men would generally be better administrators than women. In Frontiero,

the assumption underlying the federal armed services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of service women would not.

"In contrast, the different treatment of men and women naval officers under [the challenged sections] reflects, not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 42 L.Ed. 2d at 618. (emphasis in original)

The Court concluded that "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs. [citation to House Report omitted]. Cf. Kahn v. Shevin, 416 U.S. 351." 42 L.Ed. 2d at 618.

Justice Brennan, with whom Justices Douglas and Marshall joined, dissented on the grounds that the majority had failed to apply the strict scrutiny test and, furthermore, that the majority had invented a governmental interest to justify the differential which interest did not, in fact, exist.

Both Kahn and Ballard reflect an unwillingness on the Court's part to overthrow legislation which it perceives as intended to benefit women, either economically or professionally. Justice Douglas, writing for the Court in Kahn, drew a distinction between statutes "designed to rectify the effects of past discrimination against women" and those "which seize upon a group--women--who have historically suffered discrimination in employment, and rely upon the effects of the past discrimination as a justification for heaping on additional economic disadvantages". 416 U.S. at 355, quoting Frontiero v. Richardson, 411 U.S. 677, 689 n. 22. However, these cases did not resolve the question of how critically the Court will examine the nexus between the classification and the state's interest in these "beneficial" situations. The Court in Kahn referred to several statistical surveys, but these merely illustrated disparity earnings of women workers and men workers, not that a $500 widow's exemption would measurably decrease this disparity. The Ballard Court referred to "the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 42 L.Ed. 2d at 618. (emphasis added). However, again, no evidence was presented to show that the means supposedly chosen to lessen this differential--giving women a 13 year period before they could be discharged for want of promotion--actually furthered this objective. These cases seemed to cast further doubt on the concept of "strict rationality", or intermediate review, inse-

curely resting as it did upon the foundation of the Court's opinion in Reed.

Shortly after the Ballard decision was announced, the Court again faced a sex discrimination issue in Weinberger v. Wiesenfeld, 43 L.Ed. 2d 514 (1975). In Wiesenfeld the Court struck down a provision of the Social Security laws which allowed both a widow and her minor children to receive payments based on the deceased spouse's earnings, but which allowed such payments only to the minor children if the surviving spouse is male. A male whose deceased wife's earnings were the couple's principal source of support during their marriage claimed that the statute unlawfully discriminated against him on the basis of his sex.

The Court found the assumption underlying the statute in Wiesenfeld, namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support, to be one of the "archaic and overbroad generalization that could not be tolerated under the Constitution." 43 L.Ed. 2d at 521-522, quoting Schlesinger v. Ballard, 42 L.Ed. 2d 618.

Finding the purpose of the legislation to be the payment of a wage earner's dependents on the basis of their probable need, the Court presumed that in ruling out widowers as beneficiaries Congress had acted on the then generally accepted presumption that a man is responsible for the support of his

wife and child. However, while remarking that this presumption was "...not entirely without empirical support...", the Court declared that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 43 L.Ed. 2d. at 523. No Justices dissented from this result.

The most recent of the Supreme Court cases dealing with sexual classifications is Stanton v. Stanton, U.S. , 43 L.Ed. 2d (1975). In Stanton the Court found that a Utah statute which specified a greater age of majority for males than for females in the context of child support payments violated the female child's right to the equal protection of the laws. Declaring that it was "unnecessary in this case to decide whether a classification based on sex is inherently suspect..." 43 L.Ed. 2d at 694, the Court, per Justice Blackmun, concluded that "...under any test compelling state interest, or rational basis, or something in between-[the statute], in the context of child support, does not survive an equal protection attack." 43 L.Ed. 2d at 696.

While the Court did not specify the standard which it used to measure the Utah statute's constitutionality, it clearly subjected the reasons offered to support the statute to a greater scrutiny than that traditionally extended to commercial or social welfare legislation. See p. 4, supra. The Court first took note of the rationale the

Utah Supreme Court had employed in upholding the statute:

> "It may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males..."

The Court then declared:

> "Notwithstanding the 'old notions' to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statute]... A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. [citation omitted]. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government, and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for

> the girl. To distinguish between the two on educational grounds is to be self-serving; if the female is not to be supported so long as the male, she can hardly be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day in the earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its <u>unquestioned truth</u> or its significance, particularly when marriage, as the statute provides, terminates minority for a person of either sex." 43 L.Ed. at 695. (emphasis added).

ANALYSIS OF SUPREME COURT CASES

A lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea.[5] One in-

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5. The cases dealing with sex-segregated educational institutions give us little guidance in this case. In <u>Williams v. McNair</u>, 316 F.Supp. 134 (D.S.C. 1970), <u>aff'd</u> 401 U.S. 951 (1971), the Court upheld the exclusion of males from an all-female college. This case was decided prior to <u>Reed v. Reed</u>, and its applicability to exclusion from an all-male in-

(Continued)

terpretation which might reconcile these cases is that sexual classifications cannot be used merely to achieve administrative efficiency or economy, but they may be used to further other, more substantive state interests. This interpretation reconciles the holdings in Reed and Frontiero, and is suggested by the Court's dicta in Kahn and Ballard.[6] However, this interpretation ignores the reasoning of

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5. (Continued)
stitution is tenuous. (However, the Williams case probably still represents good law as far as the exclusion of males from an all-girls' educational institution is concerned). Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184 (D.C. Va. 1970), the court found that the state-supported colleges available to women were academically inferior to those available to men. Edwards v. Schlesinger, 377 F. Supp. 1091 (D.C. D.C. 1974) involved a challenge to the all-male admissions policies of the United States Naval and Air Force Academies. While that court interpreted Reed as following the permissive "rational relationship" test, it is clear that the exclusion of women bore a fair and substantial relationship under the strict rationality test to the Services' objectives of preparing their academy graduates for combat duty.

6. This interpretation was expressly adopted by the Court in Edwards v. Schlesinger, 377 F.Supp. 1091 (D.C.D.C. 1974).

Wiesenfeld, where a classification was voided even though, as the Court admitted, there was empirical evidence that it furthered a state interest other than administrative efficiency or economy. Moreover, this interpretation ignores the passionate opinions, both majority and dissenting, portraying the injustices which women have suffered and the arbitrariness of many gender-based classifications.

A second possible interpretation is that the Court will impose the "strict rationality" standard in any case in which a classification along sexual lines is challenged, and will uphold such classifications only if the state is able to show that they in fact further a legitimate state interest. While this interpretation would seem to fit the Wiesenfeld and Stanton cases, it cannot explain the reasoning of Kahn, nor, perhaps, of Ballard. Conversely, an interpretation which posits the Court applying the traditionally permissive "rational relationship" test might explain Kahn and Ballard but would flounder on the shoals of Wiesenfeld and Stanton.

A third possibility is that the Court is not applying a uniform standard in reviewing sexual classifications, but will apply a different standard depending on whether the classification is viewed as beneficial or adverse to women. Cf. Kohr v. Weinberger, 378 F. Supp. 1299 (E.D. Pa. 1974); See also Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L. J. 163-187. When reviewing a sexual classification

whose effect was seen as harming women, the Court would apply a strict rationality test, Wiesenfeld; Stanton; cited supra, but when the classification is seen as alleviating the oppressed status of women in society, the Court will apply the permissive "rational relationship" test.[7]

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7. A further refinement of this approach is that the Court would only require proof of the justification underlying a sexual classification adversely affecting females if that justification is a gender-based generalization, such as the generalization that men are better able to administer estates than women, Reed v. Reed, cited supra, or the generalization that men rather than women are the family's provider. Wiesenfeld, cited supra. Conversely, the Court will not require proof of such gender-based generalizations if the classification which is based on them is seen as aiding females. Ballard, cited supra.

In the present case, defendants do not rely on any gender-based generalizations to justify Central's continued all-male status. The generalizations which they do rely on pertain to adolescent students of both sexes, namely that high-school students will work harder and do better in single-sex schools than in coed schools. However, we do not believe that the absence of a gender-based generalization takes this case out of the line (Continued)

This standard, or standards, is not without its problems. How does a court decide which legislation helps and which legislation hurts women? That this problem is not a judge's

---

7. (Continued)
of Reed and its progeny. As a court has stated in invalidating a school board's policy of enforcing a 50-50 ratio between males and females in an academic high school by denying admission to women who were more qualified than men;

> "In both Reed and Frontiero, stereotypes as to the social roles of males and females formed the bases of the classifications. An unsupported notion that an equal number of male and female students is an essential element in a good high-school education was apparently the justification for the school district's policy requiring higher grade-point averages for females than for males. While that policy is not based upon an invidious stereotype such as was present in Reed or Frontiero, we do not read those cases so narrowly as to sanction all other sex discrimination. No actual proof that a balance of the sexes furthers the goal of better academic education was offered by the school district."
> Berkelman v. San Francisco Unified School District, 501 F.2d 1264, 1269 (9th Cir. 1974). (emphasis added).

fantasy can be seen by comparing the Supreme Court's invalidation of the statute in Weisenfeld even though that statute granted its benefits only to women, and its decision in Geduldig v. Aiello, 417 U.S. 484, (1974), that pregnancy is not a gender-based classification.

The problem of identifying, in normative terms, the impact of the challenged classification on women is present to some degree in the instant case. That keeping women out of Central High has an adverse impact on them seems obvious; yet defendants can argue that the existence of Girls makes the impact of exclusion from Central neutral at worst.[8] However, this argument overlooks Susan Vorchheimer's expressed desire to attend Central, a desire which, in light of Central's history

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8. Another way of saying this is that the classification drawn here, when viewed in its totality, discriminates in favor of single-sex institutions and against coed ones, not in favor of men against women. If the classification is seen this way, the exclusion of a male from Girls would cancel out the effect of the exclusion of a female from Central. However, Susan Vorchheimer only challenges the portion of defendants' policy which relates to Central, from which she was rejected solely because of her sex. In this sense, defendants' classification is undeniably a sexual one.

and reputation, does not seem frivolous or eccentric. More importantly, the existence of Girls does not satisfy plaintiff's, or any other girl's, desire to attend a coed academic school.

The result of defendants' policy of excluding young women from Central is to deny them the opportunity to attend a coeducational, academically superior, public high school. We believe that this denial is significant enough, in light of plaintiff's express wishes and the evidence of her performance since her rejection, to justify the conclusion that it has an adverse impact on her and on other women.

Defendants could further argue that the purpose of excluding women from Central is to protect them from the disadvantages of coeducation. To begin with, the evidence presented by defendants does not establish that coeducation at an academic high school such as Central would have a detrimental effect on female students. But if such detrimental effects are assumed, the School Board could not then justify its policy of committing the vast majority of its female students to coed schools. Simply put, if coeducation is detrimental to girls, all the public schools should be sex-segregated; if it is not, then there is no "fair and substantial" relationship between sex-segregation and the educational goals of School Board. The fundamental inconsistency which would result if the School Board argues that it keeps girls out of Central for their own protection reveals

that males, and not females, are the intended beneficiaries of defendants' exclusionary policy.

Having identified this classification as adversely affecting women, we need not search for conceivable justifications for it, but may examine the evidence before us to see if it establishes "a fair and substantial relationship" to the School Board's legitimate interests. We find that it does not. Dr. Tidball's study demonstrates that single-sex education at the college level is more likely to aid a woman in developing her potential for achievement than is coed education; this study did not purport to investigate or conclude that male students are so aided. Dr. Jones's study demonstrates that both male and female students at single-sex schools in a certain environment are more likely to study longer, and value scholarship (or at least brilliance) more highly, than do their coed counterparts. The application of the Jones' study's results and conclusions to Central is problematic at best, but even if they are taken as accurate predictions of performance at a coed Central they have not been shown to relate to any of defendants' legitimate objectives. We cannot conclude without some evidence that the difference in time spent in homework or the differences in attitudes towards scholarship represented in the Jones study would have an appreciable impact on academic achievement, let alone the development of literate citizens with saleable skills. As for the School Board's stated interest in offering its students and their

parents the alternative of single-sex education, this "alternative" turns out to be the only choice available to the student who wishes to attend an academic senior high school in Philadelphia.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER; Guardians ad litem on her behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent School District of Philadelphia	:	NO. 74-791

O R D E R

AND NOW, to wit, this 7th day of August, 1975, after a hearing and upon consideration of the briefs and arguments of the parties and the arguments of intervenor defendants, judgment is hereby entered in favor of plaintiff and the class she represents and against defendants on plaintiff's claim arising under the Equal Protection Clause of the Fourteenth Amendment. Defendants are ENJOINED from refusing to admit plaintiff or any other member of the class she represents to Central High School solely on the basis of sex.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

Supreme Court, U. S.
FILED
DEC 2 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians *ad litem*, on her own behalf and on behalf of all others similarly situated,

Petitioners,

—v.—

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1976

CERTIORARI GRANTED OCTOBER 18, 1976

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[Decisions of the Court of Appeals and the District Court appear in the Appendix to the Petition for a Writ of Certiorari, 1a-86a.]

Relevant Docket Entries

March 29, 1974	Complaint filed
April 26, 1974	Answer
August 26, 1974	Plaintiff's motion for preliminary injunction
August 26, 1974	Plaintiff's motion for determination of the class
Sept. 3, 1974	Memorandum contra motion for determination of the class
Sept. 3, 1974	Memorandum contra motion for preliminary injunction
May 22, 1975	Plaintiff's motion to amend the com - plaint
May 28, 1975	Trial
May 29, 1975	Trial resumes
May 30, 1975	Trial resumes

Aug. 7, 1975	Findings of Fact, Conclusions of Law, Memorandum, and Order; Judgment entered in favor of plaintiff and the class she represents and against defendants on plaintiff's claim arising under the Equal Protection Clause of 14th Amendment; defendants enjoined from refusing to admit plaintiff or any other member of the class to Central High School solely on the basis of sex
Aug. 28, 1975	Defendant's motion to suspend injunction pending appeal

Aug. 28, 1975	Notice of appeal to Court of Appeals
Sept. 2, 1975	District Court's order denying defendants' request for a stay of the permanent injunction
Sept. 5, 1975	Court of Appeals order granting defendants' motion for stay pending appeal
Oct. 14, 1975	Court of Appeals' order vacating stay as it applies to appellee Vorcheimer
March 16, 1976	Opinion of Court of Appeals
March 30, 1976	Petition for rehearing en banc before Court of Appeals

April 12, 1976	Court of Appeals order denying motion for rehearing en banc
July 12, 1976	Petition for writ of certiorari filed in the Supreme Court of the United States
Oct. 18, 1976	Petition for writ of certiorari granted by the Supreme Court of the United States

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 74-791

SUSAN LYNN VORCHHEIMER, by her parents
BERT AND CAROL VORCHHEIMER;
Guardians ad litem
9721 Chapel Road
Philadelphia, Pennsylvania
on her own behalf and on behalf
of all others similarly situated,

Plaintiff,

vs.

SCHOOL DISTRICT OF PHILADELPHIA
and
MATTHEW W. COSTANZO, Superintendent
School District of Philadelphia
21st and the Parkway
Philadelphia, Pennsylvania

COMPLAINT - CLASS ACTION

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to title 28 U.S.C. §1343 and Title 42 U.S.C. §1983 to redress the deprivation of equal protec-

tion of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

2. This is a proceeding for declaratory and injunctive relief restraining the Defendant School District of Philadelphia from discriminating against the named Plaintiff and members of the class she represents on the basis of their sex (female) with regard to admission to Central High School of Philadelphia.

3. The named Plaintiff and members of the class she represents have no adequate remedy at law, monetary damages are not appropriate, and would not be adequate to redress the discriminatory conduct complained of herein.

Parties

4. The Plaintiff SUSAN LYNN VORCHHEIMER is a female citizen of the United States, thirteen years old, who resides at 9721 Chapel Road, Philadelphia, Pennsylvania. This action is brought on her behalf by her parents, BERT AND CAROL VORCHHEIMER, as guardians ad litem, who reside with her at 9721 Chapel Road, Philadelphia, Pennsylvania.

5. Plaintiff Susan Lynn Vorchheimer brings this action on her own behalf and

on behalf of all other persons similarly situated, pursuant to Rule 23(b) of the Federal Rules of Civil Procedure. The class which Plaintiff represents is the class of all females who are, or may in the future be, eligible for admission to Central High School of Philadelphia, in accordance with the Defendants' criteria for admission other than criteria based on sex; and the class of all Philadelphia high school students, male and female, who are attending Central High School, or Philadelphia High School for Girls, or who are or in the future may be qualified for admission to either of those schools.

6. There are common questions of law and fact affecting the rights of members of this class who are, and continue to be limited, classified and discriminated against in ways that deprive and tend to deprive them of equal opportunities because of their sex or academic achievements. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The Plaintiffs will adequately represent the interests of the class. The Defendants have acted or refused to act on grounds generally applicable to members of the class.

7. The Defendant School District of Philadelphia is an agency of the Commonwealth of Pennsylvania charged with the responsibility for carrying out the

Commonwealth's program of public education in and for the city and county of Philadelphia, pursuant to the Pennsylvania School Code.

8. Defendant Matthew W. Costanzo is the Superintendent of Schools of the School District of Philadelphia and is sued in his official capacity.

9. The Defendant School District of Philadelphia operates a system of free public education with an enrollment of approximately two hundred eighty thousand (280,000) students from elementary through high school. Of the approximate sixty-five thousand (65,000) high school students, 50.1% are male and 49.9% are female.

10. The Defendant School District operates a variety of senior high schools which it classifies as comprehensive high schools, technical high schools, academic high schools, and magnet schools.

11. There are only two academic high schools operated by the School District for the most highly qualified college bound students; Central High School of Philadelphia, which is limited to male students, and the Philadelphia High School for Girls, which is limited to female students.

12. Central High School of Philadelphia was founded in 1836 as the first public high school in Philadelphia, and the second public high school in the United States. It is the only public high school in Philadelphia with a substantial private endowment.

13. Central High School confers a Bachelor of Arts degree upon its graduates, and is the most prestigious high school in the city by reason of its history, and the accomplishments of its alumni.

14. The Philadelphia High School for Girls was established in 1893 as a secondary school for girls, having as its antecedent a teachers' training school founded in 1848.

15. Although its admission standards, other than sex, are comparable to those of Central High School, Girls' High is less prestigious, its alumnae less influential, and its educational program has traditionally suffered from sexual stereotypes attributing lower career aspirations to women.

16. The sexual segregation of Philadelphia's academic high schools imposes upon female students a badge of inferiority, teaching them expressly and by example, that they are not qualified to compete with male students in academic pursuits.

17. The sexual segregation of Central High School also injures male students by inculcating in them anachronistic ideals of male superiority which are incompatible with current legal, social and ethical standards.

18. Plaintiff Susan Lynn Vorchheimer is presently a ninth grade student at Masterman Laboratory and Demonstration School, who has maintained an "A" average throughout her junior high school education, and ranked in the ninety-eighth percentile (98th %tile) nationally in her most recent Iowa tests, well above the minimum admission standards for Central High School.

19. Plaintiff was also the youngest 1974 award recipient of the Levinson Foundation - Philadelphia Evening Bulletin essay contest whose theme was "How to Improve the Philadelphia School System" for her essay recommending the sexual integration of the city's academic high schools.

20. On or about January 11, 1974, Plaintiff's father submitted on her behalf an application for admission to Central High School, in accordance with the procedural requirements of the Defendants school system.

21. On or about February 1, 1974, Plaintiff's application for admission to

Central High School was rejected solely on the basis of her sex.

22. The refusal of the Defendants to admit Plaintiff and other academically qualified female students to Central High School constitutes arbitrary and unreasonable discrimination based upon sex violative of the Equal Protection Clause of the Fourteenth Amendment.

23. The Defendant School District's practice of maintaining only sexually segregated academic high schools also represents arbitrary and unreasonable discrimination against qualified students who attend or in the future may chose to attend the academic high schools since it denies them the benefit of a coeducational learning experience available to other students in the school system, and subjects them to the injury and abuse set forth in paragraphs sixteen (16) and seventeen (17) above.

WHEREFORE, Plaintiffs pray that this Court:

a. determine this to be a valid class action on behalf of the classes set forth herein,

b. issue a declaratory judgment determining that the Defendants' policy of excluding Plaintiff SUSAN LYNN VORCHHEIMER

and other academically qualified female students from Central High School of Philadelphia is invalid and unenforceable, on grounds that it is violative of the Equal Protection Clause of the Fourteenth Amendment,

c. issue a permanent injunction restraining the Defendants from excluding Plaintiff SUSAN LYNN VORCHHEIMER and other qualified female students from Central High School of Philadelphia.

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Attorney for Plaintiffs
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19147
WA3-6170

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 74-791

SUSAN LYNN VORCHHEIMER,
by her parents BERT and CAROL
VORCHHEIMER; Guardians ad litem
9721 Chapel Road
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on her own behalf and on behalf
of all others similarly situated

vs

SCHOOL DISTRICT OF PHILADELPHIA
and
MATTHEW W. COSTANZO, Superintendent
School District of Philadelphia
21st and The Parkway
Philadelphia, Pennsylvania

ANSWER TO COMPLAINT

FIRST DEFENSE

1. The Court does not have jurisdiction over the subject matter.

SECOND DEFENSE

2. The Complaint fails to state a

claim against defendants upon which relief can be granted.

THIRD DEFENSE

3. Defendants admit the allegations contained in paragraphs 4, 7, 8, 9, 12, 14, 18, 19, 20, and 21 of the Complaint.

4. Defendants admit the allegation in paragraph 10 of the Complaint, insofar as that allegation states that defendants operate a variety of high schools. Defendant School District of Philadelphia denies that it classifies high schools as "comprehensive high schools, technical high schools, academic high schools, and magnet schools." Rather, defendant School District of Philadelphia classifies its high schools as "senior high schools" and "vocational-technical senior high schools."

5. Defendants admit the allegations in paragraph 11, insofar as they state that Central High School of Philadelphia (Central High School) is limited to male students and that Philadelphia High School for Girls (Girls' High School) is limited to female students. Defendants deny that Central High School and Girls' High School are classified by defendant School District of Philadelphia as "academic high schools." These schools are, in fact, classified as "senior high schools," though both have extensive

academic course offerings. Defendants aver that other senior high schools also have extensive and varied academic programs. Defendants aver that, though Central High School and Girls' High School are operated for the most highly qualified college bound students, equally qualified college bound students attend the other senior high schools of the School District of Philadelphia.

6. Defendants admit the allegations in paragraph 13 of the plaintiff's Complaint, insofar as they state that Central High School confers a Bachelor of Arts Degree upon its graduates and that it is a prestigious high school by reason of its history and the accomplishments of its alumni. Defendants aver, however, that the Bachelor of Arts Degree conferred by Central High School is the exact equivalent of a high school diploma for every purpose. Defendants also aver that other senior high schools of the School District of Philadelphia have outstanding prestige by reason of their history and the accomplishments of their alumni. Furthermore, even admitting arguendo that the allegations in paragraph 13 are true, these allegations alone do not require the School District of Philadelphia to eliminate the all-male criteria for Central High School, nor do these allegations, if true, confer any rights on the plaintiff.

7. Defendants admit the allegations contained in paragraph 15 of plaintiff's Complaint, insofar as they state that the admission standards, other than sex, of Girls' High School are comparable to those of Central High School. Defendants deny that "Girls' High School is less prestigious, its alumnae less influential, and its educational program has traditionally suffered from sex stereotypes attributing lower career aspirations to women." Defendants aver that the curriculum at Girls' High School is extensive and varied, and equal to and comparable with the curriculum offered at Central High School. Defendants further aver that the alumnae of Girls' High School are active and generous with regard to granting scholarships, prizes, and awards to deserving students of Girls' High School.

8. Defendants deny each and every other allegation contained in the Complaint.

FOURTH DEFENSE

9. It is denied that defendants' refusal to admit plaintiff, and other academically qualified female students, to Central High School constitutes arbitrary and unreasonable discrimination based upon sex violative of the Equal Protection clause of the 14th Amendment.

10. The Equal Protection clause of the 14th Amendment does not require identity of treatment for all citizens, or preclude a State, by legislation, from making classifications and creating differences in the rights of different groups.

11. A legislative classification based on sex has often been held to be constitutionally permissable.

12. This classification is not arbitrary, nor without rational justification, including, inter alia, respected pedagogical opinion on the value of single-sex institutions.

FIFTH DEFENSE

13. The School District of Philadelphia offers a variety or programs for students attending "senior high school." Those programs include, inter alia, academic courses, general and commercial courses, and specialized programs, such as "magnet" and "alternative" programs. The School District also offers senior high schools for students who wish to attend an institution for their own sex.

14. Central High School is a part of the School District of Philadelphia and should not be considered in isolation from the entire program offered by the School District of Philadelphia, as more

fully described in paragraph 13.

15. Central High School has no special feature which would make it more advantageous educationally to plaintiff, than any number of other senior high schools operated by the School District of Philadelphia.

WHEREFORE, the Complaint should be dismissed.

Respectfully submitted,

/S/ _____
ALAN H. GILBERT, Assistant Counsel
Attorney for the School District of Philadelphia

COMMONWEALTH OF PENNSYLVANIA) ss:
COUNTY OF PHILADELPHIA)

A F F I D A V I T

EDWARD B. SOKEN, being duly sworn according to law, deposes and says that he is the Assistant Secretary of THE SCHOOL DISTRICT OF PHILADELPHIA and that the facts set forth in the foregoing Answer to Complaint are true and correct to the best of his knowledge, information, and belief.

_____
EDWARD B. SOKEN

[Jurat omitted in printing]

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

SUSAN LYNN VORCHHEIMER, by her
parents BERT and CAROL VORCHHEIMER,
guardians ad litem,
on her own behalf and on behalf
of all others similarly situated,

vs.

SCHOOL DISTRICT OF PHILADELPHIA

and

MATTHEW W. COSTANZO, Superintendent,
School District of Philadelphia

CIVIL ACTION

NO. 74-791

Philadelphia, Pa., May 28, 1975.

Before HON. CLARENCE C. NEWCOMER, J.

FIRST DAY

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* * *

[Trial transcript, p. 11]

SUSAN LYNN VORCHHEIMER, sworn.
DIRECT EXAMINATION

BY MS. WALLIS:

Q Miss Vorchheimer, how old are you?

A 15 years old.

Q I think you will have to keep your voice up and look at the judge when you answer.

A 15.

[p. 12]

Q Where do you live?

A In Bustleton.

Q What is Bustleton, can you identify that?

A It is a community in Northeast Philadelphia.

Q Where are you going to school at the present time?

A George Washington High.

Q What grade are you in?

A Tenth.

Q What school did you attend previous to George Washington?

A Masterman Middle School, Bustleton Elementary and Holmes Elementary.

Q Can you describe those three schools? Are they public or private?

A All three are public schools, and Masterman is an academic school similar to Girls and Central but coed.

Q What do you mean by similar to Girls and Central?

A It has similar entrance requirements and similar goals and similar reputation of excellence.

Q What grades does Masterman encompass?

A Fourth to ninth.

Q When did you start Masterman?

A In seventh grade.

Q When did you graduate from Masterman?

A Last year in ninth grade.

Q How did you do at Masterman?

[p. 13]

A I did extremely well and --

Q Keep your voice up, please.

A Okay. I did very well and on graduation I received six awards.

Q What were those awards?

A The most outstanding student, English award, history, science, geometry and American Legion award for citizenship and scholarship.

Q What is your career goal?

A I would like to be a rabbi.

THE COURT: What was that again, please?

THE WITNESS: A rabbi.

BY MS. WALLIS:

Q Do you participate in extracurricular activities at school?

A Yes.

Q What activities are those?

A In school I participate in the senior choir.

Q What are your interests outside of school?

A Outside of school I am very involved in my Youth Group, which is called Pennsylvania Federation of Temple Youth.

Q Do you hold any office in that group?

A In my local chapter I am vice president.

Q What other pursuits occupy your time outside of school?

A Housework, reading, and a lot of time is spent with the

[p. 14]

Youth group.

Q What are your responsibilities at home?

A I share with my sister and my entire family the cooking and cleaning and similar work.

Q Where do you draw your friends from, outside of school or within the school community?

A Almost all my friends are in the Youth Group.

Q And where do they go to school?

A Spread out over Eastern Pennsylvania and parts of New Jersey.

Q You are the plaintiff in this case to obtain admission to Central High School. When did you decide that you wanted to go to Central?

A Sometime in the middle of last year, in ninth grade.

Q Was that your own decision or was it influenced by your parents or other adults?

A It was my own idea and decision.

* * *

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BY MS. WALLIS:

Q Miss Vorchheimer, why did you decide you wanted to go to Central?

A I visited several schools that were among my choices and one of them was Central and I liked it there. I liked the atmosphere and also what I had heard about it, about its academic excellence.

Q Is George Washington a neighborhood school?

A Yes.

Q Are you satisfied with the education you are receiving at George Washington?

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A Not fully.

Q What is the basis for your dissatisfaction?

A It is not an academic school and there isn't as much interest either among the students or the teachers, and I don't find that I am doing as well or even enjoying myself as much as I did at Masterman, which was a much harder school.

Q How are you doing academically?

A Not up to my past standards. I am getting A's in all of my subjects except one, and that one is Math, and I almost flunked, and I am pulling it up.

Q Did you take any standardized examinations this year?

A I took the SAT's.

Q Explain to the judge what the SAT's

are.

Incidentally, I think you might look at the judge when you answer the question.

THE COURT: That is all right. If you are more comfortable looking at Ms. Wallis it is perfectly all right.

A The SAT's are a test that are required for college admission and the highest mark is 1600 and I received 1330.

Q What was your percentile rating?

A In English that was 99th percentile and in Math it was 97th, for collegebound students.

Q In view of your past performance at Masterman and your SAT scores how do you explain the decline in your academic

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standing during the last year?

A There are a lot of reasons but I think the main one is that not as much was expected by the teachers. She was satisfied if you gave her C work, and you weren't asked to give any more. Nothing is very demanding.

* * *

BY MS. WALLIS:

Q Are there other reasons that you -- you said that was the main reason. Can you enumerate any other reasons?

A I think the fact that it is not an academic school had a large part of it. And the rest just gets into personal things with teachers, and I don't think that has a basis.

Q Are there any reasons other than reasons that relate to the academic program at school?

A No.

Q Did you consider Girls High as an alternative to George Washington?

A Yes. I also visited Girls and sat in on one of the classes and walked around and I just didn't like the impression it gave me. I didn't think I would be able to go

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there for three years and not be harmed in any way by it.

MS. WALLIS: I have no further

questions of this witness, Your Honor. You may cross-examine.

MR. GILBERT: I have no questions of this witness.

* * *

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MS. FLICK: We would call Mr. Ralph Keen. Before qualifying Mr. Keen as an expert in the history of Central High School, he acts as a substitute for Mr. Diano and we wish to identify his bias with respect to this case by asking one question.

RALPH D. KEEN, sworn.

DIRECT EXAMINATION

BY MS. FLICK:

Q As a student at Central High School and a future alumnus would you want to see female students enrolled in your school?

A No.

* * *

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BY MS. FLICK:

Q Mr. Keen, what is your occupation?

A I am a student.

Q Where?

A At Central.

Q What year are you in?

A I am a senior.

Q Are you in the advanced program?

A I am receiving advance placement credits for three subjects.

Q And they are?

A English, French and Greek.

Q Are you familiar with the history of Central High School?

A Yes, I am.

Q How did you become familiar with this history?

A Well, when I entered Central in tenth grade, after several weeks of adjusting to it I sort of, well, fell in love with the school and proceeded to learn all about it, as much as I could.

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Q Did you do any particular studies or work on the history of Central High School?

A This is my second year working in the archives of the Associated Alumni of the school, as an assistant to Mr. Diano, the archivist.

Q Could you describe the archives?

A It is a large collection of documents, textbooks, books written by alumni, books written by former teachers, minutes of faculty meetings dating back to 1850, letters written to officials of the school by people from the school. It is a large collection of documents, books, records, manuscripts.

Q And have you read many of these archives?

A Yes, I have read minutes of the faculty from 1840 to 1853. I have read histories of the school, the dedication of the new building in 1902. I am also in constant contact with documents, with material.

* * *

BY MS. FLICK:

Q How did you work with Mr. Diano on these archives?

[p. 54]

A Well, last year I was collecting newspaper clippings concerning the school and alumni and doing administrative work for the association. This year the archives were moved to a new room in the building and in order to put the collection into better order I devised a classification system and have been putting that into effect. I have been rehousing documents and reclassifying and sorting archive material.

Q Did you bring with you a copy of the Central High School Handbook?

A Yes, I did, the latest edition.

* * *

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BY MS. FLICK:

Q As far as the history that is tabulated in the student handbook, what years does it purport to cover?

A From the beginning of the School District of Philadelphia in 1818 to 1970 or '71. It is the 1971 edition.

Q Did you bring with you a copy of Cornog's "School of the Republic"?

A Yes, I did.

* * *

BY MS. FLICK:

Q Cornog's "School of the Republic," your answer was you brought that one?

A Yes.

Q Do you know who Dr. Cornog was?

A Yes, he was the ninth president of Central High School.

* * *

Q This is Plaintiffs' Exhibit P-7.

What years does this history of Central High

[p. 59]

School cover?

A 1893 to 1943.

Q When was it published?

A 1952, I believe.

* * *

BY MS. FLICK:

Q Does "The School of the Republic" refer to Central High School?

A Yes, it does.

Q By whom was this book published?

A By the Associated Alumni of the school.

Q Did you bring any other copies from the archives or elsewhere relating to the history of Central High School?

A Yes, I did.

Q Which one?

A Franklin Spencer Edmonds' "History of the Central High School of Philadelphia."

Q What years does this cover?

A From the beginning of the school 1836 to approximately 1893 or '95.

Q Am I correct between these two volumes the history of such a high school is covered practically from its beginning to --

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A To 1943.

* * *

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BY MS. FLICK:

Q Do you know anything about the Barnwell Foundation?

A Yes, I do.

Q Are Barnwell Bulletins prepared from the moneys produced by the Barnwell Foundation?

A Yes, they are.

Q Who publishes the Barnwell pamphlets?

A I believe the Barnwell Foundation.

Q Where are these bulletins kept?

A They are kept in the school library and in the archives. They have been distributed to students. The latest one, the last one was in 1972 or '73 and was distributed to the entire student body.

Q In general what do the Barnwell Bulletins contain?

A They are either lectures or accounts of certain aspects of the school, either the history of the school, the alumni of the school.

MS. FLICK: I move these into evidence as part of the history of the school.

* * *

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BY MS. FLICK:

Q Are you aware of any papers that have been prepared that would update even more the history of Central High School?

A Yes, there was a student paper written in the last month which was supposed to update Dr. Cornog's history.

Q And what is the title of that paper?

A "School of the Republic Two".

Q And who is the author?

A Alan Hirshey.

Q Did you have anything to do with the preparation of this paper?

A Yes, I gathered the material that he

used for it. I guided him partially in the use of archive material for the paper.

Q Is this paper in the archives at present?

A No, it is not.

Q Is it expected that it will be in the archives?

* * *

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A It was a private paper done for a class for Dr. Carlisle. In returning the paper, the graded paper, he stated that he wanted a copy bound and placed in the archives.

* * *

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BY MS. FLICK:

Q What were the original materials from which that study was drawn?

A The study used the chronology of the school in the handbook there, also alumni journals and school newspapers, copies of the school newspaper.

* * *

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Q Can you identify the notables that have come to Central High School?

* * *

A Robert Kennedy received what I believe to be the first Barnwell Distinguished Service Award at the occasion of the 125th anniversary of the school in 1963.

Hubert Humphrey received an award, Ralph Nader visited the school and received an award, and only last year Elliot Richardson, he was the latest recipient of the Barnwell Distinguished Service Award.

BY MS. FLICK:

Q Have any Presidents of the United States come to

[p. 69]

Central High School?

* * *

A Not to receive an award.

BY MS. FLICK:

Q Well, come to Central High School to make speeches?

A Yes. President Polk visited the school in 1847 and at the dedication of the third building of the school in November of 1902 President Theodore Roosevelt visited the school with his cabinet and delivered a speech.

Q Regarding the Barnwell Foundation, what is the money used for?

A Well, the school library, it buys most of the books. There are private collections which are funded, but most of the books are purchased by the Barnwell funds. Also financially helping out in school activities, the publication and printing of bulletins, which is no longer done, as far as I understand. Also the handbooks such as this, they are called the Barnwell handbooks. They are printed by the Barnwell Foundation.

* * *

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Q How many books are there in the Central High School Library?

A Over 50,000.

Q Do you have a planetarium at Central

High School?

A Yes, we do. It is the first classroom planetarium of any high school in the country.

Q Do you have a cyclotron at Central High School?

A Yes, about 20 years ago Central science students built a cyclotron and it is still in use.

MS. FLICK: That is all.

The Findings of Fact, Conclusions of Law, Memorandum and Order of the District Court appear in the appendix to the Petition for a Writ of Certiorari, 38a - 86a.

The Opinion, Judgment, and Denial of the Petition for Rehearing of the Court of Appeals appear in the appendix to the Petition for a Writ of Certiorari, 1a - 37a.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

October Term, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents
BERT and CAROL VORCHHEIMER, guardians ad litem,
on her own behalf and on behalf of
all others similarly situated, *Petitioners*

v.

SCHOOL DISTRICT OF PHILADELPHIA AND
MATTHEW W. COSTANZO, Superintendent of the
SCHOOL DISTRICT OF PHILADEPHIA, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians ad litem, on her own behalf and on behalf of all others similarly situated, *Petitioners*

v.

SCHOOL DISTRICT OF PHILADELPHIA AND MATTHEW W. COSTANZO, Superintendent of the SCHOOL DISTRICT OF PHILADELPHIA, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the Order of the United States Court of Appeals for the Third Circuit denying rehearing en banc has not yet been reported; both are set out in the Appendix of Petitioners at 1a-37a.

The Findings of Fact, Conclusions of Law, Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania are reported at 400 F. Supp. 326; they are set out in the Appendix of Petitioners at 38a-86a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether it is consistent with the Constitution and laws of the United States for a public school district to maintain, in a system otherwise coeducational, a limited number of single-sex schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Title IX of Public Law 92-318, 20 U.S.C. §§1681-1686, as amended, provides in pertinent part:

> §1681(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.

Title II of Public Law 93-380, 20 U.S.C. §§1701-1758 (Supp. 1976), provides in pertinent part:

> §1701(a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.
>
> * * *
>
> §1703 No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> * * *

The Federal Rules of Civil Procedure, Rule 23 provides in pertinent part:

> RULE 23. CLASS ACTIONS.
>
> (a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common

to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

* * *

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

* * *

STATEMENT

Petitioner Susan Lynn Vorchheimer, then a junior high school student, sought admission to Central High School of the School District of Philadelphia. Central High School is one of two School District of Philadelphia (School District) senior high schools exclusively for the academically talented, the other being Philadelphia High School for Girls (Girls High School).

Since Central High School is for males and Girls High School for females, petitioner's application to Central High School was rejected by the Board of Education of School District. Petitioner instituted suit in the United States District Court for the Eastern District of Pennsylvania, in March, 1974, by her parents, Bert and Carol Vorchheimer, seeking an injunction preventing School District from denying her admission to Central High School, solely on the basis of her sex.

Although petitioners had styled this action as a "class action," and had moved the court for a determination of the class, to which motion School District responded, the court made no determination of the class prior to the judgment. No class action findings were made pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

Petitioners' Motion for a Preliminary Injunction, and the School District's response, were not ruled on by the court pending an adjudicatory hearing on the merits of the case.

A three-day, non-jury trial was held in May, 1975, and on August 7, 1975, the District Court issued its judgment, including Findings of Fact, Conclusions of Law, and an Order. The Order enjoined the School District from refusing to admit petitioner, or any other members of the class she represented, to Central High School, solely on the basis of sex.

The District Court made several findings with regard to the equality of Central High School and Girls High School. The court found that:

> In general, it can be concluded that the education available to the female students at Girls is comparable to that available to the male students at Central. (Fact number 30, 400 F. Supp. at 329.)

The court also found: "The courses offered at Girls are similar and of equal quality to those offered at Central." (Fact number 27, 400 F. Supp. at 329.) Finally, the court found that:

> Girls High was organized as an academic high school for females in 1893, having evolved from a school established in 1848 whose primary purpose was to train teachers for the Philadelphia public schools. While the school began by offering commercial, teacher training, and college-preparatory courses, the college-preparatory curriculum quickly overshadowed the other two. By 1910, Girls High was exclusively college preparatory. *It has fulfilled the vision of many nineteenth century educators, both men and women, by becoming the equal of Central in preparing its students for college.* (Emphasis supplied.) (Fact number 18, 400 F. Supp. at 328.)

At the trial of the cause, it was stipulated between the parties that "the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance," and that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." (Facts 32 and 33, 400 F. Supp. at 329). In addition, the School District presented substantial expert testimony on the value of single-sex education. (Facts 34 to 44, 400 F. Supp. at 329-31).

The District Court recognized that under the rational relationship standard, the above stipulations "would have proven fatal" to petitioners' case; the court also commented that "this Court would probably have felt compelled to

validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement." (400 F. Supp. at 335).

While the District Court found that under the "rational relationship" standard the School District's policy "would pass constitutional muster," (400 F. Supp. at 335), the District Court held that the School District failed to show that its policy of excluding females from Central High School bears a "fair and substantial relationship" to any of its legitimate objects. (400 F. Supp. at 333). The District Court refused to apply the rational basis standard here (which the court stated was met by the School District), although it found that *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), a case using that standard, "probably still represents good law as far as the exclusion of males from an all-girls' educational institution is concerned." (400 F. Supp. at 341, n. 5).

Petitioner was qualified for admission to Girls High School, which has admissions standards comparable to Central High School. (Fact number 24, 400 F. Supp. at 329). However, she chose not to apply for admission to Girls High School, and instead attended a coeducational comprehensive high school in her own neighborhood. The District Court found as a fact that graduates of the senior high schools of Philadelphia "have been and are accepted for matriculation by the best and most prestigious colleges and universities." (Fact number 25, 400 F. Supp. at 329). The Court of Appeals recognized that the comprehensive high schools of School District offer "a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are intellectually able to progress at a faster than average rate." (532 F.2d at 881). At the senior high school attended, petitioner has been able to qualify for early admission to college at the end of the 11th grade. (532 F.2d at 882, n. 3).

The School District's application for a stay of the Order was denied by the District Court. On appeal, a stay was granted by the Court of Appeals for the Third Circuit, pending expedited appeal. Petitioners' application to vacate the stay was assigned to the panel of the Court of Appeals designated to hear the case on the merits, which panel in a two to one decision vacated the stay with regard to the named plaintiff but not as to the class she represents. Petitioner, however, decided not to attend Central High School and continued at the comprehensive senior high school, where she was then an 11th grade student.

The Court of Appeals for the Third Circuit in a two to one decision reversed the judgment of the District Court. The court adopted the findings of the District Court concerning the equality of Girls High School and Central High School, and stated that it was a fair summary of the parties' position that "the schools for boys and girls are comparable in quality, academic standing, and prestige." (532 F.2d at 882). Further, the Court of Appeals held that "the finding of the District Court discloses no inequality in opportunity for education between Central and Girls High Schools." (532 F.2d at 885).

The Court of Appeals reiterated the stipulations made in the District Court concerning the history and world-wide acceptance of educating the sexes separately. The court also noted that the Petitioners agreed that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach." (532 F.2d at 882). Further, the Court of Appeals mentioned the findings of the School District's expert concerning the higher regard for scholastic achievement and increased time spent on homework among students in single-sex schools. (532 F.2d at 882). The decision of the court recognized the importance of these stipulations and findings:

> Equal educational opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools. While this policy has limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial. (532 F.2d at 887).

The District Court had noted that "the outcome of this case depends on which standard of review is applied." (400 F. Supp. at 334). In reversing the judgment of the District Court, the Court of Appeals held that under either the rational or substantial relationship tests "the regulations establishing admission requirements to Central and Girls High School based on gender classification do not offend the Equal Protection Clause of the United States Constitution." (532 F.2d at 888).

Although no allegation of any statutory violation was made in the Complaint, discussed by the District Court, or briefed by the parties, the Court of Appeals requested that the parties address themselves to certain statutory issues at the oral argument. The Court of Appeals reviewed the statutory issues, 532 F.2d at 883-885, and held that no statute forbade the existence of single-sex schools. (532 F.2d at 885).

The Court of Appeals denied a petition for rehearing en banc filed by Petitioners.

ARGUMENT

I. The Decision of the Court of Appeals Is Consistent With Decisions of This Court.

This Court has ruled on a case with factual and legal issues similar to the instant matter. In *Williams v. McNair, supra,* this Court upheld the exclusion of males from an all-female college. The Court of Appeals found that *Williams* "details a fact situation quite similar to that confronting us here, except that the plaintiffs were males who sought admission to a girls' state college," and held that *Williams* had "precedential weight." (532 F.2d at 887).

Indeed, the District Court found *Williams* "probably still represents good law," but only "as far as the exclusion of males from an all-girls' educational institution is concerned." (400 F. Supp. at 341, n. 5). The Court of Appeals, however, did not accept the view that *Williams* was inapplicable here "merely because males were barred rather than females, as in the case *sub judice.*" (532 F.2d at 887).

None of the cases decided subsequent to *Williams* requires a different result herein. In no case has this Court held sex to be a suspect classification. Indeed, the Court stated: "[G]ender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin,* 416 U.S. 351, 356, n. 10 (1974). Nor has education been held to be a fundamental right requiring the strictest scrutiny. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, *reh. den.,* 411 U.S. 959 (1973).

While it may be argued that the cases of *Reed v. Reed,* 404 U.S. 71 (1971); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Kahn v. Shevin, supra; Weinberger v. Wiesenfeld,* 410 U.S. 636 (1975); and *Stanton v. Stanton,* 421 U.S. 7 (1975), have established a standard stricter than rationality in sex discrimination cases, those cases are factually dissimilar to the instant matter. As the Court of Appeals stated in distinguishing those cases:

> In each instance where a statute was struck down, the rights of the respective sexes conflicted, and those of the female were found to be inadequate. None of the cases was concerned with a situation in which equal opportunity was extended to each sex or in which the restriction applied to both. And, significantly, none occurred in an educational setting. (532 F.2d at 886).

The Court of Appeals found *Williams* consistent with *Reed,* since the restrictive admission policies in *Williams* applied to both sexes, and did not offer one sex a preferential posture as did the statute at issue in *Reed.* The Court of Appeals held that this distinction was enough to justify the use of the rational relationship test in *Williams*, and in the case at bar. (532 F.2d at 887).

This Court has recently applied the "rational relationship" test in sustaining congressional legislation recognizing that men and women were not similarly situated with regard to promotions in the Navy and which, for that reason, provided a longer period of tenure for women officers. *Schlesinger v. Ballard,* 419 U.S. 498, *reh den.,* — U.S. —, 95 S.Ct. 1363, 43 L.Ed 2d 446 (1975).

Even using a stricter or "substantial relationship" test, the Court of Appeals found the School District's policy to meet constitutional standards:

> The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship. (532 F.2d at 887-88).

Importantly, the decision of the appellate court recognizes a basic tenet of this Court that "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members . . . ." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). The Court of Appeals noted the importance of allowing educators the ability to follow "respected educational methodology," while leaving to the courts the question of the constitutionality, not desirability, of a particular pedagogical method. (532 F.2d at 888). As the Court stated in *Williams:*

> After all, flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned. (*Williams v. McNair*, *supra*, at 138.)

Indeed, this Court has recognized and has repeatedly stated that educational questions are best left to educators and local school boards. *San Antonio School District v. Rodriguez, supra*, at 42. In permitting the School District in this case to choose differing methodology in providing an equal education to all students, the Court of Appeals is completely consistent with Supreme Court decisions recognizing the importance of local control over education. As was recently stated:

> No single tradition in public education is more deeply rooted than local control . . . [it has] long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. (*Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)).

This Court has emphasized the importance of local control over the education process in providing citizens the opportunity to participate in the decision-making process, structuring school programs to fit local needs and encouraging "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio School District v. Rodriguez, supra*, at 509.

Both the Court of Appeals and the District Court dismissed petitioners, argument based on *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Sweatt v. Painter*, 339 U.S. 629 (1950). The Court of Appeals found these cases to be inapplicable since race, but not sex, is a suspect classification. The court stated:

> We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law. (532 F.2d at 886).

The District Court held that the fact of a substantially equal education at Girls High School took the case out of the realm of *Brown*. Indeed, the court expounded on the inapplicability of *Brown:*

> We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a constitutional deprivation. While the sociological evidence which underlay Brown's finding of inferiority has not been free from challenge, there is no evidence in the present case that such a feeling of inferiority exists. (400 F. Supp. at 334, n. 1).

II. The Decision of the Court of Appeals Is Consistent With the Laws of the United States.

The specific congressional statute dealing with admissions to schools on the basis of sex is Public Law 92-

318, Title IX, §901 (1972), as amended, 20 U.S.C. §1681, et seq. That law states:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education; (20 U.S.C. §1681(a)(1))

Thus, in the statute drafted to deal specifically with *admissions* to school, the law applies "to only specified types of educational institutions and excludes from its coverage the admission policies of secondary schools." (532 F.2d at 883).

The question in the matter before this Court concerns the admissions policy of the School District. Petitioner states that "her application *for admission* to Central High School was rejected." (Petition at page 6 (emphasis supplied)). Since the law excludes the admissions policies of secondary schools from its coverage, the School District has committed no statutory violation.

Even assuming, for purposes of discussion, that the School District's policy is in the nature of an "assignment" to school, the School District has violated no law. The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-58, the Act dealing with assignment to schools, does not prohibit a school district from segregating schools on the basis of sex, although there is a specific proscription on segregation based on race, color or national origin. (20 U.S.C. §1703(a); 532 F.2d at 884).

Furthermore, the School District is in compliance with congressional policy as established by the Act that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." (20 U.S.C. §1701(a)(1)). It is clear that in the instant case Petitioner was afforded an "equal educational opportunity" without regard to sex, since the District Court found no inequality in opportunity for education between Central High School and Girls High School. (532 F.2d at 885). The Statute does not prohibit a school district from educating the sexes separately, if equal educational opportunity is provided.

It should be noted that the Statute encourages the "neighborhood" as the "appropriate basis for determining public school assignments." (20 U.S.C. §1701 (a) (2)). Petitioner did, in fact, attend her neighborhood school, George Washington High School.

If single-sex schools which provide equal educational opportunity to both sexes are to be eliminated by congressional action, that action has not, as yet, occurred. (532 F.2d at 885).

III. Since the Issue Herein Has Become Moot, There Is No Longer a "Case or Controversy" for This Court to Determine.

The named plaintiff, Susan Lynn Vorchheimer, was an eleventh grader at the completion of the last school term in June, 1976. As she stated in an affidavit accompanying a *Motion to Dissolve Stay Pending Appeal*, she was qualified for early admission to college at the end of the eleventh grade. (532 F.2d at 882, n. 5). She has been accepted at colleges, including the University of Pennsylvania and Brandeis University. Subsequent to the decision of the Court of Appeals, her father, Bert Vorchheimer, stated that she would skip her last year of high school so

she could enter college in the fall under an early admission program. (Philadelphia Inquirer, March 18, 1976.) A case or controversy therefore no longer exists between the named plaintiff and the School District.

Although the case was styled as a "class action" in the Complaint, the class was not properly certified, as required by Rule 23 (a), (b) and (c) of the Federal Rules of Civil Procedure. A similar situation was presented to this Court in *Board of School Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975). There, six students brought a class action seeking to have certain rules and regulations of the Board concerning the student newspaper declared unconstitutional and their enforcement enjoined. The named plaintiffs were or had been involved in the publication and distribution of the newspaper at the time the case was brought. In their complaint they stated that the class members were "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." *Board of School Commissioners of the City of Indianapolis v. Jacobs, supra*, at 129.

When the matter was before this Court on certiorari, it was determined that the named plaintiffs had graduated from the Indianapolis school system. The Court held that no case of controversy then existed between the named plaintiffs and the Board. *Board of School Commissioners of the City of Indianapolis v. Jacobs, supra*, at 129. As to the class, this Court found that the District Court's attempt to certify a class did not comply with Rule 23(c)(1) and (3) of the Federal Rules of Civil Procedure. The District Court had ordered that "the remaining named plaintiffs are qualified as proper representatives of the class whose interests they seek to protect." This Court held that the class action was not properly certified, nor the class properly identified. *Board of Commissioners of the City of Indianapolis v. Jacobs, supra*, at 130.

Similarly, the District Court in the instant matter did not properly certify this action as a class action. The court did not act on Petitioners' class action motion prior to the Judgment and Order, and when the court did rule on the class action aspect of the case, it did not make the findings which Rule 23(b) of the Federal Rules of Civil Procedure requires. That rule states that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied . . . ." Rule 23(a) prerequisites are:

> (a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In neither the Order of the court enjoining the Respondents' policy in question (400 F. Supp. at 343), nor in conclusion of law number 3 dealing with the class (400 F. Supp. at 333), did the court make the findings satisfying Rule 23(a) and (b).

By not making determinations required by Rules 23(a) and (b), the court did not make a proper class action order pursuant to Rule 23(c)(1) and the action, as in the case of *Board of Commissioners of the City of Indianapolis v. Jacobs, supra*, was not properly certified. As in that case, the action is therefore moot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-37

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Petitioners,

—v.—

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Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

To side-track adjudication of an issue plainly warranting this Court's plenary review, respondents conjure up a flaw in the district court's class action determination. Respondents concede plaintiff below properly alleged Rule 23(a) and (b)(2)

class action prerequisites and properly moved for class action determination. Their critique targets District Judge Newcomer's performance. In support, respondents rely exclusively on Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975), a decision that does not do the service claimed for it.

Board of School Commissioners v. Jacobs was decided February 18, 1975. The district court judgment in the instant case issued August 7, 1975. Respondents never questioned in the district court or in the court of appeals the form or style of Judge Newcomer's class action determination. The citation to Board of School Commissioners v. Jacobs makes its initial appearance in respondents' Brief in Opposition.

Respondents' afterthought, raised for the first time in this Court, is insubstantial. In Board of School Commissioners v. Jacobs, this Court addressed a judgment furnishing no class definition at all. There, the district court certified "the class whose interests the plaintiffs seek to protect." In contrast to that opaque designation, District Judge Newcomer, in the case at bar, defined the class with precision: "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." In short, the class description requirement of Rule 23(c)(3) is plainly met.

Respondents object in passing to District Judge Newcomer's timing of the class certification. Judge Newcomer reserved decision

on the class action motion until judgment, a practice commonly followed by district courts in Rule 23(b)(2) cases of this genre. As recently explained in Jimenez v. Weinberger, 523 F.2d 689, 697-99 (1975) (Stevens, C.J.),[1] Rule 23 affords the district judge, in appropriate cases, flexibility to defer certification "until the moment the merits are decided"; the Rule permits "the entry of a single order determining both the merits and the identity of the members of the class." Jimenez, supra, at 697, 698. While Rule 23 (c)(1) calls for class action determination "as soon as practicable," nowhere does the Rule explicitly or implicitly strip the district court of authority in (b)(1) and (b)(2) cases "simultaneously to define the class and to adjudicate the merits." Jimenez, supra, at 698, 699. In actions in which notice to class members is mandatory, specifically, (b)(3) actions, early certification is imperative to afford members a meaningful opportunity to request exclusion from the class. But the reasons for certification at a preliminary stage in a (b)(3) action surely do not apply in the (b)(2) case at bar where the sole relief sought is injunctive and no "opt out" feature is involved. And plainly, respondents do not suggest, nor could they, any conceivable prejudice to their position based on the timing of the class determination and definition.

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[1] Jimenez was decided September 12, 1975, several months after and in light of this Court's decision in Board of School Commissioners v. Jacobs. See 523 F.2d at 700 n.26.

A final newly discovered flaw respondents urge in support of their "invalid class certification, ergo moot" position is the absence in District Judge Newcomer's order of specific findings enumerating each prerequisite of Rule 23(a). For the proposition that valid certification requires ritualistic incantation by a district judge of each 23(a) subpart, respondents cite only Board of School Commissioners v. Jacobs. Nowhere in Jacobs did this Court cite as the flaw fatal to effective certification the district court's failure to spread out in findings of fact the 23(a)(1)-(4) formulae. Nor does Rule 23(c) command such findings. The complaint, motion papers and hearing record fully set out and document the Rule 23(a) prerequisites and the basis for (b)(2) certification. Under the circumstances, Judge Newcomer's conclusion as to the propriety of class action determination is fully supported.

Unlike Board of School Commissioners v. Jacobs, where the student newspaper that triggered the dispute between students and school board had ceased publication before the case reached this Court, a continuing controversy exists between the academically gifted girls who compose the class herein and the Philadelphia School District. Members of the class still find the door to Philadelphia's oldest and most celebrated school closed to them because of their sex. Beyond question, a vital controversy continues for a well-defined class so long as females are denied access to Philadelphia's Central High School. Consistent with the Court's clear

and recent precedent, the continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case. Sosna v. Iowa, 419 U.S. 393 (1975).[2]

II.

Finally, it bears emphasis that the position of the class herein is unfairly and inaccurately summarized by respondents and the court of appeals majority. Philadelphia's academically gifted young women who seek access to Central, far from conceding their opportunities are "essentially equal," challenge a system they regard as pervasively unequal. A tangible difference impossible to shroud, Central's facilities in the scientific field "are superior." 532 F.2d at 882. But a deeper inequality, more harmful to Philadelphia's bright young women, is a central feature of this case.

Central, for generations, has been the training ground for those destined to become the community's dominant actors; Girls has been the place for the sex long considered subordinate. No doubt this compartmentalization has a "long history" and "world-wide acceptance." But upon objective, unromanticized

---

[2] Cf. DeFunis v. Odegaard, 416 U.S. 312, 317 (1975), in which the Court pointed out "DeFunis did not cast his suit as a class action" but sought relief for himself alone.

appraisal of that "history" and "acceptance"

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.[3]

In a world and nation with "a long and unfortunate history of sex discrimination,"[4] all-male institutions for superior students impede women's opportunities to establish themselves in academia, business, the professions, and politics as fully equal to men.

---

[3] Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973).

[4] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

Conclusion

For the foregoing reasons, and the reasons stated in the petition, certiorari should be granted.

Respectfully submitted.

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September, 1976

Supreme Court, U. S.
FILED
DEC 2 1976
MICHAEL RODAK, JR., CLERK

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Respondents.

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880. That court's order denying rehearing *en banc* is not yet reported; it is set out in the Appendix to the Petition for a Writ of Certiorari at 36a. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326. Copies of all opinions and orders below are set out in the Appendix to the Petition for a Writ of Certiorari (Pet. at 1a-86a).*

* References to the Petition for a Writ of Certiorari are designated herein by the abbreviation "Pet."; the separate Appendix filed together with this Brief is designated "App."; Brief for Respondent in Opposition to Certiorari is designated "Br. Opp.".

Jurisdiction

The judgment of the court of appeals was entered March 16, 1976; a timely petition for rehearing *en banc* was denied April 12, 1976. The petition for a writ of certiorari was filed July 12, 1976; certiorari was granted October 18, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Equal Educational Opportunities Act of 1974 (Title II of Public Law 93-380), 20 U.S.C. §§1701-1758 (Supp. 1975), provides in pertinent part:

> 1701(a) The Congress declares it to be the policy of the United States that—
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . .
>
> 1702(a) The Congress finds that—
>
> (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the fourteenth amendment . . . .

> 1703 No State shall deny equal educational opportunity to an individual on account of his or her . . . sex . . . by—
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of . . . sex . . . among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .
>
> 1705 [T]he assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of . . . sex . . . .

Question Presented

Whether the Constitution and laws of the United States permit a municipal public school system to maintain totally sex-segregated senior high schools for scholastically-superior students, where the effect is to reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities.

Statement of the Case

Petitioner Susan Vorchheimer commenced this class action on March 29, 1974, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. At that time, she was a ninth grade student enrolled in her final year at the J. R. Masterman School, a coeducational facility and the only junior high school the Philadelphia School District maintains for academically-gifted students. (Fact Findings 4, 13; Pet. 39a, 41a.) Susan Vorchheimer sought to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to the Central High School, Philadelphia's most renowned, scholastically-oriented secondary school. (Fact Findings 17, 19-22, 26; Pet. 42a-45a.) Philadelphia School District maintains no coeducational high school for scholastically-superior students. (Fact Findings 7, 8; Pet. 40a.) Pursuant to Fed. R. Civ. P. 23(b)(2), Susan Vorchheimer was certified as the representative of "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." (Conclusion 3; Pet. 55a.)

Upon graduation from the J. R. Masterman School in June 1974, Susan Vorchheimer was designated "most outstanding student" by that coeducational junior high school for superior students. She received in addition several other awards, including awards in science and geometry. (Fact Finding 14; Pet. 41a.) Despite her conceded academic qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex. (Fact Findings 12, 14, 15, Conclusion 4; Pet. 41a-42a, 55a.)

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High which, as the name implies, is confined to females. These two schools differ from other Philadelphia secondary schools in fundamental respects. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from the entire city. Most Philadelphia high schools are neighborhood schools and are substantially overcrowded; enrollment at Central and Girls is under capacity. (Fact Findings 6, 7, 29, 51; Pet. 39a-40a, 45a, 54a.)

Central and Girls are single-sex schools; the vast majority of public high school students in Philadelphia attend coeducational schools. (Fact Finding 8; Pet. 40a.) A senior high school student seeking the highest quality academic preparation the District offers does not have the choice of attending a coeducational school. (Conclusion 5; Pet. 55a-56a.)

Central was founded in 1836. The first public high school in Philadelphia and the second in the nation, it has consistently maintained a national reputation for academic excellence and the distinction of its graduates. (Fact Findings 17, 19, 20; Pet. 42a, 43a-44a.) Girls High evolved from a school established in 1848 for the primary purpose of training teachers for Philadelphia's public schools. (Fact Finding 18; Pet. 43a.)

It is undisputed that "in the scientific field . . . Central's [facilities] are superior" to those of Girls High. (Pet. 3a. See also Fact Finding 26; Pet. 45a.)

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma mater. Central is the only high school in Philadelphia with a substantial private endowment. (Fact Findings 20-22; Pet. 43a-44a.)

These plain facts, found by the district court and not contested on appeal by Philadelphia School District, explain the unique position of Central. No similar findings were made, nor could they be made, as to Girls: it has not attracted the same national attention, alumni contributions or endowment; its science facilities are inferior to those of Central.

Based on these findings, the district court held that Central's exclusionary policy adversely affects the class Susan Vorchheimer represents: the policy denies them access to a school with an unequaled history and national reputation; it denies them the opportunity to attend a coeducational, academically-superior public high school. (Pet. 83a.) Benefiting women is not one of Philadelphia's objectives in excluding females from Central. (Conclusion 5; Pet. 56a.) Males, not females, the district court determined, are the intended beneficiaries of Philadelphia's discriminatory academic high school arrangement. (Pet. 84a.) Concluding that the arrangement denies females the equal protection of the laws, the court enjoined Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any

other member of the class she represents to Central High School solely on the basis of her sex." (Pet. 86a.)[1]

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"),[2] the Court of Appeals for the Third Circuit reversed 2-1.[3] The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." (Pet. 13a.) Further, it called attention to the unquestioned superiority of Central's facilities in the scientific field. (Pet. 3a.) Inexplicably, in light of the record and fact findings below, the majority held that the class of academically-gifted young women Susan Vorch-

[1] The district court's ruling in favor of the class petitioner represents was made in August 1975, on the eve of Susan Vorchheimer's entrance into the eleventh grade. She was then attending George Washington High School, the coeducational comprehensive secondary school in which she elected to enroll in preference to Girls. At George Washington, petitioner's motivation and performance declined due in part to her perception that expectations and demands at the comprehensive school were lower than the standards set by her teachers at the academically-oriented junior high school she had attended. (Fact Finding 16; Pet. 42a.) Transfer to Central, however, was blocked by a September 5, 1975 stay of the district court order obtained by Philadelphia School District from the court of appeals. Ultimately, an application to vacate the stay was granted as to Susan Vorchheimer individually, but not as to the class she represents. By that time, however, Susan Vorchheimer was several weeks into her final high school year. With her secondary school days nearing completion, Susan Vorchheimer was accorded the transfer opportunity too late to utilize it effectively. She continued at George Washington for the few remaining months, and is now a first year student at the University of Pennsylvania.

[2] Pet. 2a.

[3] Judge Gibbons dissented; Judge Weis was joined in the majority by Chief Judge Markey of the Court of Customs and Patent Appeals.

heimer represents is not denied the equal protection of the laws by Philadelphia School District's reservation of the superior Central facility to males. In addition, ruling on a statutory issue not aired in the district court,[4] the majority held Congress could not have meant what it said when it declared in 1974:[5]

> [T]he maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies . . . the equal protection of the laws guaranteed by the fourteenth amendment. 20 U.S.C. §1702(a)(1).

Summary of Argument

I.

Central High School of Philadelphia and Philadelphia High School for Girls are in a class apart from all other Philadelphia School District secondary schools. Central, with admissions limited to boys, and Girls, also a single-sex school, are the only Philadelphia public high schools maintained exclusively for the most highly qualified college-bound students.

Central is the premier institution in the Philadelphia secondary school system. Girls is a distinguished school, but it does not possess Central's unique facilities and endowments. Nor does Girls possess, in the degree Central does, "those qualities . . . incapable of objective measurement . . .

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[4] This issue, the application of the Equal Educational Opportunities Act of 1974, was raised *sua sponte* by the court of appeals.

[5] See also 20 U.S.C. §§ 1703(c), 1705, 1715.

that make for greatness in a school." *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950).

Central is distinguished from all other Philadelphia secondary schools by its long, proud history, its unique reputation for training leaders, its first rank prestige in the community, and the marked influence of its active, loyal alumni, men who hold positions of power in the city, state and nation. Like the women's colleges founded in the late nineteenth century to offer women an education denied them by elite male institutions, Girls does not share the history, leadership training reputation, and influential alumni support that characterize its "brother" school.

More tangible differences also mark Central as the superior school. Central, but not Girls, has a private endowment available for library development, lecture and award programs. Central's science facilities are superior to Girls'.

II.

Philadelphia School District's exclusion of females from "Central," and its assignment of academically-gifted young women to "Girls," signify an inequality even identical facilities and endowments would not cure. The very names the schools bear symbolize this inequality. Given Central's prominence as the historic training ground for the community's dominant actors, preservation of the Central "males only" admission rule cautions young women, at a vital stage in their intellectual and social development, not to anticipate in adulthood full and equal partnership with men.

III.

Repeated recognition has been given by this Court to the preeminent importance of education as a governmental function and concern. The Court has emphasized that equal protection measurement of educational experiences entails more than a checklist of components susceptible to ready quantification. Of overriding importance, the Court has said, are factors "incapable of objective measurement" that contribute to the quality of a school.

The class herein seeks access to more than Central's unquestionably superior scientific facilities. Critical to the interests of the class are all attributes of Central that "make for greatness" in that school, including Central's history, national reputation, and devoted and distinguished alumni. Further, the talented young women whose rights are at stake seek education in an environment facilitating intellectual and social interaction with equally talented young men, interaction that will assist them to cope with the adult world in which they will live and work. In context of the subordinate place so long assigned to women in society, no school "sister" to Central can provide an educational experience genuinely equal in character, quality and effectiveness.

IV.

Exclusion of girls from Philadelphia School District's Central High School, thus from the unique facilities, tangible and intangible, that premier school offers cannot survive examination in the light of this Court's precedent from *Reed* v. *Reed,* 404 U.S. 71 (1971), through *Stanton* v. *Stanton,* 421 U.S. 7 (1975). That body of precedent establishes that explicit gender-based distinctions operating to the detriment of females are inconsistent with the Constitution's equal protection requirement. The Court has acknowledged the nation's "long and unfortunate history of sex discrimination." Central's "males only" admission rule is a product of that history.

"Compensation" for past injustice or disadvantage is not proffered as a rationale for the discrimination at issue. Far from bestowing any benefit on the class herein, Central's closed door dampens the aspirations, reduces the opportunities, and limits the expectations of Philadelphia's academically-gifted young women.

V.

This Court's summary affirmance in *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971), must be assessed with the facts of that case firmly in view. *William* v. *McNair* upheld exclusion of males from an all-female state college established to give young women education "suitable to their sex." Not even remotely involved in *Williams* v. *McNair* was any claim that males were excluded from the best educational opportunities the state supplied. Complainants in that litigation had a wide choice among state institutions, including prestigious coeducational institutions, for any program they might wish to pursue. In stark contrast, the class herein does claim denial of access to a school more advantageous educationally than any other institution, a school possessing unique qualities that give it unparalleled standing in the community.

VI.

No legitimate educational objective is fairly and substantially served by excluding girls from Philadephia's premier Central school. Achievement of females in the sciences and their preparation for later professional training in scientific fields are objectives manifestly disserved by reservation of Central's concededly superior facilities to males. The premise that sex-segregated education for scholastically-superior students is "natural and reasonable" reflects overbroad, stereotyped generalizations and assumptions of the precise kind this Court has firmly rejected as grounds for separate legal regulation of the sexes. Retention of Central as a male preserve impedes awareness in male students that females are fully equal to them in intellectual capacity, perpetuates inequities to which females are exposed, and in fact is a prime example of them.

No evidence instructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically-superior students was presented by the School District. Nor is freedom of choice a justification for the School District's policy. For students seeking and qualified for the best academic education Philadelphia offers, there is no coeducation option. The policy in question defies rational justification. It is an anachronism that retards progress toward a society in which women and men stand together as full and equal partners.

VII.

The Equal Educational Opportunities Act of 1974 outlaws school assignments that segregate students on the basis of sex. That Act provides secure support, indepen-

dent of the constitutional ground, for the claim asserted by the class herein. To override the clear language Congress used, the majority below indulged in a tortured analysis of legislative non-history that should attract this Court's disapprobation.

VIII.

The district court certified Susan Vorchheimer as the representative of a precisely defined class: "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." This certification conformed in all necessary respects to Federal Rules requirements. Deferral of certification until final judgment, a practice commonly employed in Rule 23(b) (2) cases of this genre, was an altogether appropriate exercise of the district court's discretion. Rule 23(a) (1)-(4) prerequisites are fully documented in the complaint, motion papers and trial record. The district court so concluded, and committed no error fatal to effective certification in refraining from rote recitation of each 23(a) (1)-(4) subpart.

Beyond question, the vital controversy initiated by Susan Vorchheimer continues full strength in concrete form for a well-defined class so long as females are denied access to Philadelphia's Central High School. The continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case.

ARGUMENT

I.

Exclusion of females, solely on the basis of sex, from Philadelphia's Central High School constitutes invidious discrimination against intellectually-gifted young women in violation of the fourteenth amendment's equal protion requirement.

A. *By Reserving the Central High School Exclusively to Academically-Gifted Boys, Assigning Academically-Gifted Girls to the Girls High School, and Offering No Coeducational Facility for Scholastically-Superior Students, the Philadelphia School District Perpetuates a Separate and Unequal Arrangement.*

1. Central High School Is the Philadephia School District's Premier Secondary School; No Other School in the District Shares Central's National Reputation, Rich Endowment, or Superior Scientific Facilities.

Petitioner Susan Vorchheimer and the class she represents, Philadelphia's most highly qualified, college-bound young women, seek to open the doors of Philadelphia's oldest and most distinguished high school, Central High School of Philadelphia, to females.[6] Philadelphia High School for Girls, the only other public high school in Phila-

[6] The Court of Appeals incorrectly characterized this case as one in which the petitioner "does not allege a deprivation of an education equal to that which the school board makes available to boys." (Pet. 12a.) At every stage of this litigation petitioner has maintained that at no school in the Philadelphia system can girls receive an education equal to the one boys receive at Central High. See, *e.g.*, Complaint paras. 13 and 15, App. 9a.

delphia reserved for academically-gifted students,[7] is not Central's equal. Distinguished by superior and unique tangible facilities and endowments, Central also "possesses to a far greater degree [than Girls] those qualities which are incapable of objective measurement but which make for greatness in a . . . school." *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950). See pp. 21-23 *infra.*

Central High is portrayed in the District Court's Fact Findings as a school uniquely situated by virtue of the "position and influence of [its] alumni, [its] standing in the community, [its] traditions and prestige." *Sweatt* v. *Painter, supra,* 339 U.S. at 634. Founded in 1836, Central was Philadelphia's first public high school and the second public high school in the United States.[8] (Fact Finding 17;

[7] Respondents endeavored to discount the distinctions between Philadelphia's two academic high schools, Central and Girls, and the city's other high schools as well as the differences between Central and Girls. Rejecting respondents' line-blurring effort as to the character of Philadelphia high schools, both courts below observed that Central and Girls are in a class apart from Philadelphia's other secondary schools. (Opinion of the Court of Appeals, Pet. 3a. District Court Fact Findings 5-7, 9, 29; Pet. 39a, 40a, 45a.)

[8] Central's illustrious history is recounted in W. Cornog, School for the Republic (1952) (covering the years 1893-1943) (Plaintiff's Exhibit 7), and F. Edmonds, History of the Central High School of Philadelphia (1902) (covering the years 1836-1893) (Plaintiff's Exhibit 14). These histories ascribe Central's outstanding position to a deliberate design consistently pursued from the time of the school's founding. This design is indicated in the 1938 remarks of Franklin Spencer Edmonds:

> I was a member of the Board of Public Education in the period when district high schools were established. . . . It was never intended that the Central High School should become merely a district school. It was always contemplated that [Central] . . . would perform each year its great function of sending out a group of young men who would become leaders in industry and in life.

Cornog, *op. cit. supra,* at 310.

Pet. 42a.) Central's graduates are prominent in the professional, political, and cultural life of their city, state and nation; the school has a deserved reputation for training future "leaders in all fields of endeavor." (Fact Finding 19; Pet. 43a.) Not only do Central graduates enhance their alma mater's reputation by their accomplishments. In addition, Central High's alumni take an active role in the life of the school through financial contributions and participation in day-to-day affairs, with a dedication and loyalty equal to that of many college alumni. (Fact Finding 22; Pet. 44a.) The Alumni Association of Central High School is influential within Philadelphia "both because of its activities as a group and the individual positions held by its members." (Fact Finding 21; Pet. 44a.)

The Fact Findings describe Girls High as a school distinguished in its own right, but an institution lacking the unique prestige, reputation, and affiliations with community leaders Central enjoys. Organized as an academic high school in 1893, Girls High is the successor to a teacher training school. (Fact Finding 18; Pet. 43a.) Girls' very origin reflects the traditional impediments to achievement by women. Historically, schools for young women, in contrast to the Central School for boys, have not served as training grounds for future "leaders in all fields of endeavor." Rather, schools for girls have "turn[ed] out finely educated women, responsible citizens, who would fill the socially acceptable roles of teacher, philanthropist, social worker, and/or the informed wife and companion of a real leader." L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education 139 (1976).[9]

[9] As dramatically stated by Eunice Fuller Barnard in 1932, woman's education "merely allowed her to get all dressed up, with no place to go." *Ibid.*

Girls High does have alumnae who hold positions of note, but "the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central." (Fact Finding 23; Pet. 44a.) Nowhere in the Findings of Fact as to Girls High is there documentation, as there is for Central, of a long, unparalleled history, a unique reputation for training leaders, prestige of the first rank within and outside the community, or the marked influence of active, loyal graduates who hold positions of power in city, state and nation. Like the women's colleges founded in the late nineteenth century to offer women an education denied them by elite male institutions,[10] Girls High is an outstanding school, but it is not the most prominent. That first position, inevitably, is held by Central.

More tangible differences also mark Central as the superior school. Central High is the only Philadelphia public secondary school with a substantial private endowment. (Fact Finding 28; Pet. 45a.) Central's library of over 50,000 books has been made possible to a large extent by its private endowment. (Testimony of Ralph Keen, App. 39a.) In part through its reputation as a training ground for community leaders (Fact Finding 20; Pet. 43a) and in part through its private endowment (Testimony of Ralph Keen, App. 38a-39a), Central has attracted the attention of national leaders. Presidents Polk and Theodore Roosevelt are among the notables who visited Central during its early decades. (Fact Finding 20; Pet. 43a.) In more recent years, under the auspices of the Barnwell Foundation, a private fund established for the benefit of Central High School, Attorneys General Robert Kennedy and Elliot Richardson,

[10] See pp. 39-40 *infra*.

Vice-President Hubert Humphrey, and consumer advocate Ralph Nader have addressed Central students. (Fact Finding 20; Pet. 43a. Testimony of Ralph Keen, App. 38a.) In a symbolic gesture reflecting its proud traditions and history, Central alone of Philadelphia's high schools confers a Bachelor of Arts degree upon its graduates. (Complaint para. 13, Answer para. 6; App. 9a, 15a.)[11]

In marked contrast, Girls High has no substantial endowment to buy books, sponsor lectures or make awards; it has no outstanding speakers program.[12] Girls' library is only three-fifths the size of Central's (Testimony of Ruth M. Klein, Tr. 223; Testimony of Ralph Keen, App. 39a.) Like Philadelphia secondary schools other than Central, Girls awards only the standard high school diploma.

Central's science facilities cap the long list of the school's unique features. Without dispute, Central has science facilities superior to those at Girls.[13] (Fact Findings 26; Pet. 45a. Opinion of the Court of Appeals, Pet. 3a.) Central

[11] Central students also rank higher on standardized tests: 51% of Central's students, but only 43% of Girls High students, ranked in the 85th percentile or above on the California Achievement Test. (Fact Finding 51; Pet. 54a.)

[12] It is unlikely, for example, that President Theodore Roosevelt would have visited turn-of-the-century Girls or that he would have told an audience of young women, as he told Central boys, "Don't flinch, don't foul, and hit the line hard." *Id.*

[13] The court of appeals and, to a lesser extent, the district court failed to accord sufficient weight to the admitted superiority of Central High in the field of science. Both courts, after acknowledging the superiority of Central's science facilities, then label the facilities and education of the two schools "comparable." (Opinion of Court of Appeals, Pet. 3a-5a. District Court Fact Finding 30; Pet. 45a.) This is a contradiction; if one school has better facilities than another school, then the facilities are not equal or "comparable."

boasts a cyclotron built by its own students and the first planetarium in any high school in the country. (Testimony of Ralph Keen, App. 39a-40a.) Central has a slightly smaller student body than Girls High, yet Central has one more science teacher and one more math teacher than Girls. (Answers to Plaintiff's Interrogatories at 4, 10, and 12.) The bonus Central enjoys in science and math faculty is nowhere compensated in Girls' faculty; Central simply has two more faculty members than Girls, although Central serves fewer students. (Answers to Plaintiff's Interrogatories at 7.)

The class petitioner represents includes potential physicians, research scientists and engineers, talented young women plainly disadvantaged by the denial of equal facilities. Like Susan Vorchheimer, who won awards in geometry and science (Fact Finding 14; Pet. 41a), these young women have a right to the best science education the city offers without discrimination on the basis of sex. Reservation of the best science education for boys betrays a view of the talents and position of the two sexes at odds with the ethos of modern society.[14]

Susan Vorchheimer, visiting Central and Girls High to decide the course of her education, sensed immediately the differences between the two schools. Asked at trial why she decided she wanted to go to Central, she responded:

> I visited several schools that were among my choices and one of them was Central and I liked it there. I liked the atmosphere and also what I had heard about it, about its academic excellence.

[14] See pp. 34-35 *infra*.

(Testimony of Susan Lynn Vorchheimer, App. 25a.) Asked if she had considered Girls, she replied:

> Yes. I also visited Girls and sat in on one of the classes and walked around and I just didn't like the impression it gave me. I didn't think I would be able to go there for three years and not be harmed in any way by it.

(Testimony of Susan Lynn Vorchheimer, App. 28a.) Basing her decision on the precise factors this Court recognized in *Sweatt* v. *Painter, supra,* 339 U.S. at 633-34, as critical considerations in assessing the quality of a school, Susan Vorchheimer chose Central. But Central closed its doors to her solely because of her sex.

Not content with second best, Susan Vorchheimer and the class she represents seek to open Philadelphia's finest high school to all academically-talented students regardless of sex. For one hundred and forty years the best—Central High—has been reserved for Philadelphia's young men. Like the black students seeking admission to the University of Texas Law School in *Sweatt* v. *Painter, supra,*[15] the young women of Philadelphia with high aspirations and the scholastic abilities to match now ask for equal opportunity, for the right to attend the premier school the public maintains for its future leaders.

[15] Particularly significant in light of the factors this Court stressed in *Sweatt* is Central's impressive record of elevating sons of modest families, immigrant parents, and members of minority groups to positions of prestige and high social and economic status.

2. In a Society With "a Long and Unfortunate History of Sex Discrimination," Total Sex Segregation in Municipal Secondary Schools for Superior Students Impedes Women's Opportunities to Establish Themselves in Academia, Business, the Professions, and Politics as Fully Equal to Men.

Even if Girls' facilities, origin and history approached the theoretical "separate but equal" model, the claim of the class herein would be well founded. The very names assigned the two schools tell the story; the designations "Central" and "Girls" are symbolic of a larger inequality identical facilities and endowments would not cure.

Central, for generations, has been the training ground for those destined to the ranks of Philadelphia's dominant actors; Girls has been the place for the sex long considered auxiliary. No doubt this compartmentalization has a "long history" and "world-wide acceptance." Indeed, petitioner stipulated to the tenacity of the practice and the view even of some modern educators that sex separation in learning situations is "natural" and "reasonable." 532 F.2d at 882 (Pet. 4a). But upon objective, unromanticized appraisal of that "history" and "acceptance" in schools, on the job and in the home

> [o]ne realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.[16]

In perhaps the most thoughtful study of the problem to date, pursued in the context of college education, Christopher Jencks and David Reisman concluded:

[16] *Green* v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973).

> The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges . . . . The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.

The Academic Revolution 297-98 (1968).[17] Jencks and Reisman further observed that men too pay a price for the sexual arrogance preserved by all-male schools. And they commented that the arguments against women's schools, though impressive, are not as persuasive as the arguments

[17] *Cf.* this Court's recognition in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954):

> To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

A similar consequence follows when female applicants are excluded from a prestigious all-male institution. As poignantly stated by a young woman who succeeded in "desegregating" a formerly all-male public high school for gifted students seven years ago: "The exclusion [of females from New York City's Stuyvesant High School] insinuates immaturity on the part of girls—and certainly produces it in both sexes. A boy who has never worked with a girl in the classroom is bound to think of her as his intellectual inferior . . . . It really messes up the growth of a person's mind." de Rivera, On De-Segregating Stuyvesant High, in Sisterhood Is Powerful 366, 371 (R. Morgan ed. 1970).

Ms. de Rivera's conclusion has been verified by attitudinal research, which shows that both males and females tend to regard women as more passive and men as more "potent," and that this tendency is significantly greater among members of both sexes who attend single-sex schools. R. Dale, *Mixed or Single-Sex School?* vol. III, 221-22 (1974).

against men's schools: "This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense." *Id.* at 298.

In sum, Philadelphia School District's refusal to admit Susan Vorchheimer and her class to Central, and its insistence that these academically-gifted young women be content with their place at Girls, viewed in historical and social context, carry a clear message. In a world and nation with "a long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973),[18] Philadelphia School District's policy signals to women that they should not anticipate full and equal partnership with men; the policy places an official imprimatur on categorization of females as members of "the second sex."

B. *A Municipality's Exclusion of Females From an Educational Opportunity, Solely on the Basis of Sex, Cannot Survive Measurement Against This Court's Decisions Acknowledging as Constitutional Principle the Right of Females to the Genuinely Equal Protection of the Laws.*

1. This Court's Decisions Recognize Education as a Vital Government Function With an Overwhelming Impact on the Life of Individuals and of the Nation.

Repeated recognition has been given by this Court to the preeminent importance of education in our society. The Court has acknowledged the tremendous impact education

[18] See also *Mathews* v. *Lucas*, —— U.S. ——, 96 S. Ct. 2755, 2762 (1976) (historic legal and political discrimination based on sex, like discrimination based on race, has been severe and pervasive).

has on the development of the individual and the correlative awesome responsibility placed on those who educate:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. *Board of Education,* 347 U.S. 483, 493 (1954).

In *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), although declining an invitation to stamp education a "fundamental right," the Court reaffirmed its "abiding respect for the vital role of education in a free society." Adverting to the "grave significance of education" and the polity's "historic dedication to public education," 411 U.S. at 30, the opinion in *San Antonio* notes, "[w]hat was said [in *Brown*] in the context of racial discrimination has lost none of its vitality with the passage of time." 411 U.S. at 29.

Significantly, four years before the *Brown* decision, the Court emphasized that equal protection measurement of the quality of an educational experience entails more than a checklist of components susceptible to ready quantification. Part of "effective" education is the chance to "engage in discussions and exchange views with other students," peers with whom one will associate, compete and cooperate in occupational and professional pursuits. *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U.S. 637, 641 (1950). Further, of overriding consequence in determining equal opportunity are "those qualities . . . incapable of objective measurement . . . which make for greatness in a . . . school." *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950). Prime among those qualities, the Court identified the school's historic standing in the community daily indicated by the "position and influence of the alumni." While *Sweatt* and *McLaurin* involved law school and graduate education, the Court stressed in *Brown* that factors taken into account in those earlier decisions, particularly considerations not easily quantified, "apply with added force to children in grade and high schools." 347 U.S. at 494.

The young women whose interests are at stake in this litigation seek education not in "an academic vacuum, removed from the interplay of ideas and the exchange of views" [19] among talented young men and women. Rather, they wish to pursue their studies in an environment that should be the norm for a society in which "equal opportunity is the law." For generations, Central has been the training ground for community leaders in business, politics, the professions. In context of the subordinate place so long assigned to women in society, no school "sister" to Central can supply an educational experience genuinely equal in character, quality and effectiveness.

2. Gender-Based Discrimination That Operates to the Detriment of Females Is Wholly Without Support in Currently Viable Precedent.

In 1971, this Court departed from a century's course of decision consistently affirming official authority to classify

[19] *Sweatt* v. *Painter, supra,* 339 U.S. at 634; see Note, 8 Wash. & Lee L. Rev. 54, 58-59 (1951).

by gender;[20] the Court ruled unanimously that a legislature's "arbitrary preference established in favor of males . . . cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction." *Reed* v. *Reed,* 404 U.S. 71, 74. Idaho's statute requiring, as between persons "equally entitled" to administer a decedent's estate, that "males . . . be preferred to females" was held unconstitutional: the preference failed equal protection measurement because it did not fairly and substantially advance a legitimate legislative objective.[21] *Reed* was appraised by courts and commentators as a path-marking decision. *E.g., Wood* v. *Mills,* 528 F.2d 321, 324 (4th Cir. 1975) (*Reed* and its progeny teach that sex-based classifications require "strong justification"); Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) ("Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive.").

A year and a half later, in an 8-1 judgment in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), the Court held incon-

[20] *Bradwell* v. *Illinois,* 83 U.S. (16 Wall.) 130 (1873) (no constitutional impediment to exclusion of women from the practice of law); *Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162 (1874) (women are persons and may be citizens but, like children, are properly placed in a special category and have no constitutional entitlement to the franchise); *Muller* v. *Oregon,* 208 U.S. 412 (1908) (working hours limitation denies men due process but is permissible for women); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948) (state may keep bartending a male preserve); *Hoyt* v. *Florida,* 368 U.S. 57 (1961) (female jury service may be restricted to those who volunteer).

[21] The legislative objective in *Reed,* reducing probate court burdens, was altogether legitimate. The means to reach that end, gender classification, was the constitutional shoal on which the statute foundered.

sistent with the equal protection principle federal statutes indulging the presumption that a serviceman's wife, but not a servicewoman's husband, is "dependent." The legislation at issue in *Reed* was a nineteenth century relic, related to the day when married women lacked capacity to contract on their own behalf. In *Frontiero,* by contrast, the Court dealt with 1949 and 1956 legislative products, laws reflecting a common statutory arrangement.[22]

Guided by the vibrant precedent established in *Reed* and *Frontiero,* the Court declared unconstitutional a Louisiana law that restricted jury service by women to volunteers. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975). In so ruling, the Court explicitly overturned a 1961 decision, *Hoyt* v. *Florida,* 368 U.S. 57, once formidable authority for the constitutionality of legislative resort to gender pigeonholing in lieu of functional classification.

In *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), a unanimous Court held constitutionally infirm the Social Security Act's provision of a mother's benefit for the caretaker of a deceased male wage earner's child, but no corresponding father's benefit for the caretaker of a deceased female wage earner's child. *Wiesenfeld* was the first occasion on which the Court confronted and rejected a defense emphasizing the factor of cost.[23] Further, the *Wiesenfeld*

[22] See Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181 (1973); Note, Presumption of Dependence in Workers' Compensation Death Benefits as a Denial of Equal Protection, 9 U. Mich. J.L. Ref. 138 (1975) (state workers' compensation legislation).

[23] The Solicitor General told the Court in *Wiesenfeld* that "the [annual] cost of [extending benefits to widowed fathers] would be $20 million (and over $300 million if other closely analogous provisions were extended)." Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld, supra.*

opinion dealt sharply with the proposition that in reviewing gender classifications in the social security program, particular deference to the legislative judgment should be the judicial perspective.

Most recently, in *Stanton* v. *Stanton,* 421 U.S. 7 (1975), the Court held unconstitutional Utah's age of majority differential, 18 for girls, 21 for boys, applicable to a parent's child support obligation. Mr. Justice Blackmun, writing for eight members of the Court, emphasized the importance of equal educational opportunity to a society in which women and men live and work together in full partnership: "The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice." 421 U.S. at 15.[24]

In *Taylor, Wiesenfeld* and *Stanton,* as in *Reed, Frontiero,* and the case at bar, it was apparent that women were harmed by the classifications in question. Though Billy Jo Taylor is a man, his case was argued in tandem with *Edwards* v. *Healy,* 421 U.S. 772 (1975) (remanded for mootness determination), in which female complainants charged that Louisiana's "benign dispensation" served to keep women in their place. *Stanton* was brought to secure support for a daughter. *Wiesenfeld* developed the point, initially made in *Frontiero,* that presuming women "dependent," men "independent" contributes to and exacerbates discrimination encountered by female wage earners.

On the other hand, the Court has upheld gender lines regarded as operating solely to compensate women for past

[24] Cf. *Mathews* v. *Lucas,* —— U.S. ——, 96 S. Ct. 2755, 2762 (1976).

and present economic disadvantages, classifications perceived by the Court as helpful to some women, harmful to none. *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).[25] However, most gender lines in the law, this Court has acknowledged, tend to pigeonhole and limit the options of members of both sexes. See *Wiesenfeld, supra,* 420 U.S. at 651-52. And the Court is no longer susceptible, as it once was,[26] to compensatory rationalizations for laws predicated on generalized assumptions about "the way women (or men) are." See generally Note, 89 Harv. L. Rev. 95 (1975).

"Compensation" or "rectification" for past injustice or disadvantage, of course, is not proffered here as a rationale for discrimination. On the contrary, the district court determined that "fostering career successful women is not one of [Philadelphia School District's] objectives" in excluding females from the District's Central High School. (Conclusion 5; Pet. 56a.) Susan Vorchheimer and other talented young women similarly circumstanced are not kept out of Central for their own benefit, protection or advancement. Rather, as the district court noted, "males, and not females, are the intended beneficiaries of [Philadelphia School District's] exclusionary policy." (Pet. 84a.)

[25] See also *Kohr* v. *Weinberger,* 378 F. Supp. 1299 (E.D. Pa. 1974), *judgment vacated,* 422 U.S. 1050 (1975); *Polelle* v. *Secretary of Health, Education and Welfare,* 386 F. Supp. 443 (E.D. Ill. 1974); *Lewis* v. *Cohen,* 417 F. Supp. 1047 (E.D. Pa. 1976) (in according female wage earners a retirement benefit computation formula more favorable than the one applicable to male wage earners, Congress legitimately took into account 1) pervasive wage discrimination against gainfully-employed women, and 2) compulsory early retirement policies applied by employers to female workers but not to male workers—favorable formula alleviated this discrimination against wage-earning women without disadvantaging any member of that class).

[26] See note 20 *supra.*

In sum, exclusion of girls from Central, thus from the unique facilities, tangible and intangible, that premier school offers, dampens the aspirations, reduces the opportunities, and limits the expectations of Philadelphia's brightest young women. The denial of genuinely equal opportunity to the class herein cannot stand in the face of this Court's decisions from *Reed* through *Stanton*.

3. This Court's Summary Affirmance in *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971), Confirms That the Constitution Does Not Safeguard to Males or Females the Right to Attend a State-Operated College to Which They May Commute; *Williams* v. *McNair* Does Not Supply Authority for the Optionless Sex Segregation in the Case at Bar.

Principal reliance has been placed by respondents on this Court's summary disposition in *Williams* v. *McNair, supra.* (Br. Opp. 10-12.) Similarly, the court of appeals majority saw "no basis for differentiating between *Williams* and the case at bar," and viewed that decision as "strong, if not controlling authority." 532 F.2d at 887 (Pet. 15a). Closer inspection should have revealed that *Williams* v. *McNair* is not genuinely in point. For that case entailed no optionless sex segregation, nor any educational disadvantage imposed on members of one sex.

Williams v. *McNair* concerned South Carolina's university system, a system comprising a wide range of educational institutions, all but two of them coeducational. The first exception, the Citadel, was an all-male college. Designated as a military school, the Citadel granted degrees in engineering and also offered a full complement of undergraduate liberal arts courses. The second, Winthrop, was

"designed as a school for young ladies . . . [giving] special attention to many courses thought to be specially helpful to female students." 316 F. Supp. at 136.[27]

Plaintiffs in *Williams* v. *McNair* were males who sought admission to Winthrop. They were "free to attend either an all-male or . . . a number of co-educational institutions at various locations over the State." 316 F. Supp. at 137-38. They claimed no special feature connected with Winthrop that would "make it more advantageous educationally to them than any number of other State-supported institutions." 316 F. Supp. at 138. In short, a principal factor on which their preference for Winthrop rested was its proximity to their homes. Ruling that the Constitution does not safeguard to students a right to attend the state college in their home town, the district court entered judgment for defendants and this Court summarily affirmed.[28]

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[27] A clarifying footnote to the district court's opinion sets out relevant provisions of the South Carolina Code as follows (316 F. Supp. at 136 n.3):

> See Section 401, Title 22, Code of South Carolina (1962):
>
> "There shall be established an institution for the practical training and higher education of white girls which shall be known as Winthrop College * * *."
>
> In Section 408, Title 22, the purpose of Winthrop College was stated to be:
>
> "The establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State, the main object of which shall be (1) to give to young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, drawing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress-making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness . . . ."

[28] The district court opinion in *Williams* v. *McNair* does essay appraisal of the then "state of the art" on constitutional challenges

The summary affirmance in *Williams* v. *McNair*, rendered without hearing argument and without opinion, and never cited as precedent by this Court, must be assessed with the precise facts of that case firmly in view. Not even remotely involved in *Williams* v. *McNair* was any claim that Winthrop's existence deprived males of the best educational opportunities the state supplied. The complainants in *Williams* v. *McNair* had a wide choice among state institutions, including prestigious coeducational institutions, for any program they might wish to pursue. In stark contrast, the class herein does claim denial of access to an institution that is more advantageous educationally than any other institution, an institution possessing superior scientific facilities and, most significantly, intangible qualities, including the "position and influence of the alumni," that give it unparalleled standing in the community. See *Sweatt* v. *Painter, supra,* 339 U.S. at 634.

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to official line drawing by gender. The opinion sets out as the most recent High Court expression *Hoyt* v. *Florida*, 368 U.S. 57 (1961), a decision now overturned, see *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); it states that gender-based discrimination by law or regulation is constitutional unless "wanting in any rational justification." 316 F. Supp. at 136. This Court's summary affirmance in *Williams* surely does not imply agreement with that proposition. Rather, full opinions of "this Court treating the question on the merits" (*Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)), indicate the heightened review standard evolving in gender discrimination cases since *Reed* v. *Reed, supra,* the path-marking decision rendered some months after the *Williams* summary affirmance. See, *e.g.*, *Weinberger* v. *Wiesenfeld, supra, Stanton* v. *Stanton, supra.*

II.

Excluding females from Central High School does not fairly and substantially serve any legitimate objective of the Philadelphia School District.

In reviewing gender-based classifications this Court examines asserted justifications in light of the genuine objectives sought to be served, and does not hypothecate rationalizations for such classifications. See *Weinberger* v. *Wiesenfeld, supra.* The general purposes of the Philadelphia School District, as stated in the District Court Fact Findings, are: producing "good and constructive citizens, who are literate in every sense, and who are able to communicate effectively"; teaching "saleable skills." (Fact Finding 48; Pet. 52a-53a.) Specific goals include: "increasing the efficiency and basic skills of the students"; "providing educational options to students and their parents." (Fact Finding 49; Pet. 53a.) A goal long served by Central High School, a "higher institution" envisioned as a facility "stronger and more progressive" than other District schools, is leadership training. See Cornog, *op. cit. supra,* at 310.

Maximizing time spent on homework is not one of the School District's goals. (Fact Finding 50; Pet. 53a.) Nor is socializing students to conform to traditional masculine and feminine roles. On the contrary, the District is specifically mandated by the State Department of Education to take affirmative action to eliminate "sexism" from its curriculum, teaching materials and personnel policies. (Plaintiff's Exhibit P, at 2.)

The record in this case indicates no educational objective served fairly and substantially by excluding girls from Philadelphia's premier Central school. Achievement of Philadelphia's academically-superior students was not shown to be greater in sex-segregated schools than in co-educational schools. Nor does exclusion of females from Central assist members of the class herein "to adjust normally to [their] environment," or to "prepar[e] . . . for later professional training." *Brown* v. *Board of Education, supra,* 347 U.S. at 493.

Achievement of females in the sciences and their preparation for later professional training in scientific fields are objectives manifestly disserved by reservation of Central's concededly superior facilities to males. The gross underrepresentation of women in the sciences has generated widespread recent discussion and concern. A Scientific Manpower Commission report on doctorates achieved by men and women in the United States is illustrative: in the years 1970-1975, 42% of the doctorates in modern foreign languages, but only 7% of the doctorates in the physical sciences, were earned by women;[29] in 1974-1975, only 53 women, 1.7% of the total, achieved doctorates in engineering.[30] Yet there is a clear consensus among educators that female students possess in full measure ability to succeed in scientific studies. The problem, uniformly identified: females are deliberately channelled away from specialization in mathematics and science in preparatory education.[31] Consequently, they lack the background and training requisite to advancement in professions that rely heavily on these disciplines.

[29] B. Vetter & E. Babco, Professional Women and Minorities: A Manpower Data Resource Service (1975), October 1976 Supp. at 51.

[30] *Id.,* October 1976 Supp. at 317.

In the district court, appellant Susan Vorchheimer stipulated to the evident historic fact that "there are educators who regard education in a single-sex school as a natural and reasonable educational approach."[32] 532 F.2d at 882 (Pet. 4a). But nothing in the record identifies the premises underlying that approach. The court of appeals majority speculated that the approach may be based on "human experience,"[33] and a "theory of equal benefit." 532 F.2d at 887 (Pet. 13a-14a). More likely, the judgment that sex-segregated education is "natural and reasonable" is rooted in die-hard habits of thought, customary generalizations concerning the expected behavior, proclivities and preferences

[31] See L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education 167 (1976); E. Maccoby & C. Jacklin, The Psychology of Sex Differences 367 (1974); N. Frazier & M. Sadker, Sexism in School and Society 136 (1973); J. Michaels & D. McCulloch, Rationale and Design for Reducing Sex Differences in Occupational and Educational Attainment by Strengthening Across-Sex Peer Influences, Johns Hopkins University Center for Social Organization of Schools Report No. 196, at 3-4 (May 1975); P. Boring, Sex Stereotyping in Educational Guidance, in Sex Role Stereotyping in the Schools 14, 16-17 (National Education Association 1973).

[32] However, even proponents of single-sex education acknowledge that the overwhelming weight of opinion among educators in the United States favors coeducation. J. Jones & J. Shallcrass, Coeducation and Adolescent Values, 63 J. of Ed. Psych. 334 (1972); W. Kolesnik, Educational Psychology 121 (2d ed. 1970) (cited in Defendants' Requests for Admissions at 4, para. 14).

[33] Cf. *Lamb* v. *Brown,* 456 F.2d 18, 20 (10th Cir. 1972) (rejecting "the demonstrated facts of life" as support for gender lines in the law).

of the two sexes, familiar, overbroad assumptions about "the way girls and women (or boys and men) are" [34]—in short, the very generalizations and assumptions this Court has firmly rejected as grounds for separate legal regulation of the sexes. See *Stanton* v. *Stanton, supra.*

In lieu of the stimulus and challenge furnished by interaction with males as intellectual peers, co-workers and competitors, Philadelphia School District offers the class herein an "artificial temporary community" [35] that lacks correspondence with the world outside. Concomitantly, the School District's policy breeds myopia in young men. "[I]n a time which values the female intellect, male students must grow up with the awareness that it does indeed exist." S. Hyde, Jr., Dean of Faculty, Report to the Trustees of Andover, reprinted in 64 Andover Bulletin 1, 4 (January 1971), and 31 Independent School Bulletin 20, 22 (December 1971).[36] Retention of Central as a male preserve impedes that awareness, perpetuates inequities to which females are exposed, and in fact is a prime example of them.

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[34] The perspective of a leading advocate of single-sex education is illustrative: "The coeducational school is . . . contributing to . . . confusion among men as well as women as to what masculinity and femininity are all about." W. Kolesnik, Coeducation: Sex Differences and the School 10 (1969) (cited in Defendants' Requests for Admissions at 4, para. 17).

[35] Schneider, Our Failures Only Marry: Bryn Mawr and the Failure of Feminism, in Woman in Sexist Society (V. Gornick & B. Moran eds. 1971).

[36] Cf. A. William Olsen, Jr., Headmaster, A Look into the Future, Hotchkiss Alumni Magazine 3 (Spring 1973): "One of the goals I have for Hotchkiss is that it prepare its youngsters for the world into which they will be moving. For their sake we cannot afford to do anything else. This is going to be a coeducational world. Men are going to be working side by side with women, not just living with them. The sooner we as a school accept this fact the better."

To justify its policy, Philadelphia School District relied on the testimony of two expert witnesses: Dr. J. Charles Jones, who reported on an *attitude* (not *achievement*)[37] survey he administered in New Zealand general schools; Dr. M. Elizabeth Tidball, who reported the results of her random selections from 1910's to 1950's Who's Who of American Women.

Dr. Jones acknowledged, and the district court found, that the New Zealand general school survey was uninstructive as to the environment, single-sex or coeducational, best suited to Philadelphia's academically-superior students. (Fact Findings 39-50, Conclusion 5; Pet. 48a-53a, 55a-56a.) Nonetheless, the court of appeals majority found impressive Dr. Jones's "hypotheses" as to the higher regard of single-sex school students for scholastic achievement. 532 F.2d at 882. But compare with the *hypotheses* credited by the majority below, the *experience* reported by formerly all-male United States schools attracting academically-gifted students:[38]

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[37] *But see* R. Dale, *op. cit. supra,* at 266: Studies measuring educational achievement "show with reasonable definitude that the common belief that boys make better progress in single-sex schools —and even that such schools have a higher attainment level than co-educational ones—is a myth, and it appears probable that the advantage lies with boys in co-educational schools." Even the validity of Dr. Jones's attitudinal survey has been put in question by a more recent study, based on a broader sample, which reached contrary results. Fenner, Coeducational Values and Satisfaction with School, 66 J. of Ed. Psych. 9 (1974).

[38] During the past decade, the movement toward coeducation in the United States has been overwhelming. Particularly striking is the change in the complexion of private institutions. Operating free from fourteenth amendment or statutory strictures, these institutions have embraced coeducation as a matter of sound educational policy. The National Association of Independent Schools reports that in the academic year 1963-1964, only 38.3% of its

[I]t is unquestionable that the addition of girls to the student body and of women to the faculty has made Exeter a stronger and more interesting school. (F. Tremallo, Associate Dean of Students, The Phillips Exeter Academy, May 5, 1972.)

Princeton is now in its third year of undergraduate coeducation . . . . Members of the faculty and the administration have found that the participation of women has made for a better academic atmosphere. (R. Goheen, Princeton University President's Report 5 (October 1971).)

[C]oeducation [was] regarded as an overwhelming success by every [Andover] student and faculty group that could be identified. (F. Peterson, Jr., Director of the Office of Research and Evaluation, 68 Andover Bulletin 1 (Winter 1975).)

Dr. Tidball's sampling,[39] the district court concluded, "appears to be inapplicable to academic performance at an

member schools were coeducational. By 1974-75, 66.4% were coeducational. Coeducation Packet Supplement: Reports from Schools on Their Experience with Coeducation, National Association of Independent Schools (1976).

Among distinguished day and boarding secondary schools which have become coeducational, either through merger or the acceptance of students of the formerly excluded sex, are: Andover-Abbott, Massachusetts; St. Paul's, New Hampshire; Exeter, New Hampshire; Hotchkiss, Connecticut; Trinity, New York; St. Paul-Summit, Minnesota; Denver-Kent, Colorado; Lakeside-St. Nicholas, Washington.

Among colleges and universities, Harvard has merged with Radcliffe, Brown with Pembroke, and Notre Dame with St. Mary's. Yale, Princeton, Dartmouth, and Amherst accept women. Bennington, Vassar, Sarah Lawrence and Connecticut College accept men.

[39] Dr. Tidball is a professor of physiology at a medical school. She teaches courses in cardiovascular physiology and experimental

institution such as Central." (Conclusion 5; Pet. 56a.)[40] Even the court of appeals majority relegated her contribution to a footnote. 532 F.2d at 882 n.2 (Pet. 4a).[41] Dr. Tidball did not and could not compare with her women's college achievers what women graduating in the 1910 to 1950 decades might have achieved had they been educated at the nation's most prestigious, richly-endowed colleges.[42] For those institutions, *e.g.*, Amherst, Brown, Dartmouth, Harvard, Princeton, Yale, like Central today, closed their doors to women during the period Dr. Tidball surveyed.

The "women only" colleges that schooled many of the achievers in Dr. Tidball's selection were established, late in the nineteenth century, in substantial part in reaction to the unwillingness of men's colleges to become coeducational.[43]

neuroendocrinology. She has impressive credentials as a physical scientist, but her fields of professional expertise do not encompass educational policy, sociology, or indeed any of the social sciences. (Curriculum Vitae of M. Elizabeth Tidball, Joint Pre-Trial Memorandum, at 20-37.)

[40] In view of this Court's rejection of overbroad generalizations as justification for classification based upon sex, statistical results indicating that single-sex education is beneficial to some, or even most, girls would not justify imposing this system on females who do not conform to the pattern.

[41] Moreover, a more recent study by Dr. Tidball identified Massachusetts Institute of Technology as the undergraduate school producing the highest percentage of female graduates who earned doctorates. The second and third highest were also from coeducational colleges. Tidball & Kistiakowsky, Baccalaureate Origins of American Scientists and Scholars, 193 Science 646, 648 (1976).

[42] Her finding that in the early decades of this century, Who's Who of American Women listed more graduates of women's colleges than graduates of coeducational colleges is as instructive and probative as a finding that in those same years the largest percentage of black doctorates came from Howard University.

[43] See generally L. Baker, I'm Radcliffe! Fly Me!—The Seven Sisters and the Failure of Women's Education (1976); E. Kendall, Peculiar Institutions (1975); E. Flexner, Century of Struggle 23-40, 115-33, 240-43 (rev. ed. 1975).

In sum, the value of Dr. Tidball's testimony is indicated in the remarks of an uncommonly perceptive educator nearly a century ago. Columbia President Frederick A. P. Barnard, in one of his annual pleas for coeducation, his 1881 report to the Columbia board of trustees, wrote:[44]

> The Colleges for women recently established in the State of Massachusetts . . . are, probably, all things considered, the best examples of their kind in the United States; but no thoughtful man can doubt that, had the money expended in their erection been given to Harvard University, with the condition that that institution should do the work which they are doing, the result would have been far more advantageous to the people of the State . . . .

Finally, it bears emphasis that the operation of academic high schools on a totally sex-segregated basis does not promote freedom of choice. For scholastically-superior students seeking the best academic education the Philadelphia system offers, there is no coeducation option. Far from establishing a "fair and substantial relationship" to legitimate educational objectives,[45] see *Reed* v. *Reed, supra,*

[44] L. Baker, *op. cit. supra* note 43, at 15. See also *id.* at 141: "Founded not to provide leadership for a society but to provide intellectual exercise for the heretofore academically disenfranchised, the women's colleges . . . generally left both the rights and responsibilities for leadership to their betters."

[45] In general, Philadelphia School District pursues a policy of coeducation. Only five schools of over 20 secondary schools in the Philadelphia system were single-sex at the time of trial. (Fact Finding 31; Pet. 45a-46a.) In 1974, the District converted one of its few single-sex schools to a coeducational facility. (Answers to Plaintiff's Interrogatories at 13.) Since the trial, the number of one-sex schools, including Central and Girls, has been reduced to four. Under the circumstances, Philadelphia School District's own policy is inconsistent with the testimony of the witnesses it called to establish the superiority of single-sex education. (See Pet. 83a.)

404 U.S. at 76, Philadelphia School District's policy reinforces a tradition that retards progress toward a society in which women and men stand together as full and equal partners.[46]

III.

Exclusion of females from Philadelphia School District's Central High School violates the Equal Educational Opportunities Act of 1974, in which Congress proscribed assignment of students to schools solely on the basis of sex.

In the Equal Educational Opportunities Act of 1974, Congress declared "all children enrolled in public schools are entitled to equal educational opportunity without regard to . . . sex . . . ." 20 U.S.C. §1701(a)(1). Congress found "the maintenance of dual school systems in which students are assigned to schools solely on the basis of . . . sex . . . denies to those students the equal protection of the laws . . . ." 20 U.S.C. §1702(a)(1). And Congress outlawed school assignments that result "in a greater degree of segregation of students on the basis of . . . sex . . . ." 20 U.S.C. §1703(c). Further, Congress stipulated that assignments based on grade level or type of education, to conform to equal educational opportunity and equal protection laws, must not have as a purpose "segregating stu-

[46] See S. Hyde, Jr., Dean of the Andover Faculty, The Case for Coeducation, 64 Andover Bulletin 1, 4 (January 1971), 31 Independent School Bulletin 20, 22 (December 1971): "The modern partnership of adult men and women depends upon mutual respect for the abilities and qualities of the other sex, on appreciation of similarities as well as differences; and this understanding requires a sharing of experience with the other sex . . . throughout the years of formal education."

dents on the basis of . . . sex . . . ." 20 U.S.C. §1705. In these clear words, Congress proscribed the very conduct at issue here.

Philadelphia operates a dual school system on the basis of sex in its senior academic high schools. See 20 U.S.C. §1702(a)(1). Mandatory separation of students by sex in the only schools specially maintained for academically-gifted students surely does increase the degree of segregation on the basis of sex within the school system, precisely the practice prohibited by 20 U.S.C. §1703(c). And by reserving the Central facilities for boys, the Philadelphia School District surely does deny girls equal educational opportunity without regard to sex. See 20 U.S.C. §1701(a)(1).

To override the clear language Congress used, the majority below engaged in a tortured analysis of legislative non-history. No debate or discussion of the 1974 Act[47] adds to or detracts from the plain meaning of the sex discrimination proscription. Unable to cloud the 1974 Congressional text by resort to contemporaneous legislative materials, the court of appeals majority reached back to a statute (Public Law 92-318, Title IX, §901 (1972))[48] enacted over two years earlier by a different Congress. It gleaned from the absence in 1972 legislation of a ban on sex discrimination in academic high school admissions,[49] a legislative intention in 1974 to say one thing and mean another. Commenting on this mode of statutory construction, Judge Gibbons, in his dissenting opinion, said:

[47] Legislative debate, all three court of appeals judges acknowledged, centered on the emotion-laden school busing issue.

[48] 20 U.S.C. §§ 1681 *et seq.*

[49] The 1972 legislation did proscribe sex discrimination in admissions to vocational (technical) high schools. 20 U.S.C. §1681(a)(1).

> The majority argues that Congress spoke clearly in 1972 when it did not enact legislation prohibiting single-sex schools and that the silence of the ninety-second Congress should control . . . interpretation of the words of the ninety-third Congress . . . in 1974. Congressional silence, especially that of a different Congress, . . . can never be used to supersede the otherwise clear language of a statute. (532 F.2d at 891, Pet. 23a.)

Judge Gibbons followed, and the majority below ignored, this Court's instruction that

> [t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction . . . may furnish dubious bases for inference in every direction.

Gemsco, Inc. v. *Walling,* 324 U.S. 244, 260 (1945). For

> [t]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Lynch v. *Alworth-Stephens Co.,* 267 U.S. 362, 370 (1925), quoting from 294 Fed. 190, 194. See also *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Ex parte Collett,* 337 U.S. 55, 61 (1949).

Legislative history cleanly in point, of course, should command judicial attention. See *Train* v. *Colorado Public Interest Research Group,* —— U.S. ——, 96 S. Ct. 1938, 1942 (1976); *Cass* v. *United States,* 417 U.S. 72, 78-79 (1974). But where history is ambiguous, the statutory text

itself remains the prime indicia of legislative intent. *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 412 n.29 (1971). And where the history invoked relates to an earlier day, different bills,[50] and a different Congress, the likely result, the one achieved by the majority below, is obfuscation, not clarification.

The Equal Educational Opportunities Act provides secure support, independent of the constitutional ground, for the judgment of the district court. The court of appeals majority reached a contrary conclusion only by ignoring the plain meaning of the words used in the Act and divining legislative intent in a manner that should attract this Court's disapprobation.

[50] In addition to the bill passed in 1972 prohibiting sex discrimination in vocational (technical) high school, but not academic high school admissions, the majority below also referred to an unsuccessful 1972 legislative effort. (532 F.2d at 884, Pet. 8a-9a.) As this Court has pointed out, unsuccessful attempts at legislation are hardly the best guides to legislative intent. *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367, 381-82 n.11 (1969) (inconclusive history of earlier legislative proposals superseded by specific language of bill ultimately enacted).

IV.

This properly certified class action constitutes a vital, continuing controversy so long as females are denied access to Philadelphia's Central High School.

Petitioner was a junior high school student when she commenced this litigation. Mindful of the pace of the judicial process, she did not bring suit "on behalf of [herself] alone," but "cast [her] suit as a class action." *DeFunis* v. *Odegaard,* 416 U.S. 312, 314, 317 (1974). She properly alleged Fed. R. Civ. P. 23(a) and (b) (2) class action prerequisites, and properly moved for class action determination. District Judge Newcomer, following a full airing of the controversy, defined the class with the precision required by Rule 23(c) (3): Susan Vorchheimer was certified as the representative of "all those females, who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." (Conclusion 3; Pet. 55a.)

Consistent with a practice commonly employed in Rule 23(b) (2) cases of this genre, District Judge Newcomer deferred decision on class certification until final judgment on the merits. See *Jimenez* v. *Weinberger,* 523 F.2d 689. 697-99 (7th Cir. 1975) (Stevens, C.J.), *cert. denied sub nom. Mathews* v. *Jimenez,* —— U.S. ——, 96 S. Ct. 3200 (1976). In the courts below, respondents did not question that procedure. Opposing certiorari, however, respondents objected, "[t]he court did not act on Petitioners' class action motion prior to the Judgment." (Br. Opp. 17.) Respondents' tardy objection is insubstantial. For Rule 23 plainly affords the district judge flexibility, in an appro-

priate case such as this one, to defer certification "until the moment the merits are decided," to enter "a single order determining both the merits and the identity of the members of the class." *Jiminez* v. *Weinberger, supra,* 523 F.2d at 697, 698.[51] Respondents do not suggest, nor could they, any conceivable prejudice to their position based on the timing of the class determination and definition.

Similarly insubstantial is respondents' further assertion, also raised for the first time in this Court, that a district court's class action certification is invalid absent specific findings enumerating each Rule 23(a) subpart. (Br. Opp. 17.) For this novel proposition, respondents cite only *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). Nowhere in *Jacobs* did this Court identify as a flaw fatal to effective certification a district court's failure to spread out in fact findings the Rule 23(a) (1)-(4) formulae. Nor does Rule 23(c) command such findings. Where, as in the instant case, the complaint, motion papers and hearing record fully set forth and document the Rule 23(a) prerequisites and the basis for (b)(2) certification, ritualistic repetition by a district judge of each 23(a) specification is surely not essential to the validity of class action certification.

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[51] In actions in which notice to class members is mandatory, specifically, Rule 23(b)(3) actions, early certification is imperative to afford members a meaningful opportunity to request exclusion from the class. But the reasons for certification at a preliminary stage in a (b)(3) action surely do not apply in the (b)(2) case at bar where the sole relief sought is injunctive and no "opt out" feature is involved. Thus, the Rule 23(c)(1) instruction to certify "as soon as practicable" does not strip the district court of authority in (b)(1) and (b)(2) cases "simultaneously to define the class and to adjudicate the merits." *Jimenez* v. *Weinberger, supra,* 523 F.2d at 698-99, decided after and in light of this Court's decision in *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). See 523 F.2d at 700 n.26.

Jacobs, sole authority for respondents' "invalid class certification, ergo moot" afterthought (Br. Opp. 15-17), contrasts sharply with the case at bar. In the instant action, District Judge Newcomer precisely defined the class in the manner directed by Rule 23(c). In *Jacobs,* the district court order furnished no class definition at all; there, this Court addressed a judgment supplying only the opaque designation, "the class whose interests [the plaintiffs] seek to protect." 420 U.S. at 130. Moreover, the student newspaper that triggered the dispute between students and school board in *Jacobs* had ceased publication before the case reached this Court. 420 U.S. at 129. In glaring contradistinction, the situation of the academically-gifted girls who compose the class herein has not changed in any respect. Beyond question, the vital controversy initiated by Susan Vorchheimer continues full strength and in concrete form for a well-defined class so long as females are denied access to Philadelphia's Central High School. That controversy remains active and pointed so long as members of the class find the doors to Philadelphia's oldest and most celebrated secondary school closed to them because of their sex. Philadelphia School District "undoubtedly continue[s] to enforce the challenged [practice] and yet, because of the passage of time," the practice "escapes full appellate review at the behest of any single challenger." *Sosna* v. *Iowa,* 419 U.S. 393, 400, 401 (1975).[52] Consistent with the Court's clear and very recent precedent, *Sosna* v. *Iowa, supra,* the continuation of this genuine controversy between class members and respondents precludes a mootness disposition in this case.

---

[52] In view of the grant of certiorari in this case, and the plain message of *Sosna, DeFunis* and *Jimenez, supra,* it may be that respondents will not persist in burdening this Court with their misguided argument concerning the existence *vel non* of a constitutional "case or controversy" herein.

Conclusion

For the reasons stated above, the judgment of the court of appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court enjoining Philadelphia School District from refusing to admit members of the class herein to Central High School solely on the basis of their sex.

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Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-37.

SUSAN LYNN VORCHHEIMER by Her Parents BERT and CAROL VORCHHEIMER Guardians Ad Litem on Her Own Behalf and on Behalf of All Others Similarly Situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO Superintendent of the School District of Philadelphia,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS.

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1976

—

No. 76-37

—

SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians ad litem, on her own behalf and on behalf of all others similarly situated, *Petitioners,*

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia, *Respondents.*

—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—

BRIEF FOR RESPONDENTS.

—

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F. 2d 880. That Court's order denying rehearing *en banc* is not yet reported: it is set out in the Appendix to the Petition for a Writ of Certiorari at 36a. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326. Copies of all opinions and orders below are set out in the Appendix to the Petition for A Writ of Certiorari (Pet. at 1a-86a).[1]

1. References to the Petition for A Writ of Certiorari and attached Appendix are designated herein by the abbreviation "Pet." and "Pet. a" respectively; the Brief for Petitioners and the separate Appendix are designated "Br." and "Br. a" respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 16, 1976, a petition for rehearing *en banc* was denied April 12, 1976. The petition for a writ of certiorari was filed July 12, 1976; certiorari was granted October 18, 1976. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether it is consistent with the Constitution and laws of the United States for a public school district to maintain, in a system otherwise coeducational, a limited number of single-sex schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED.

Constitutional Provision:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

Public Law 92-318, Title IX, § 901, as amended, 20 U. S. C. § 1681, et seq., provides in pertinent part:

> § 1681 (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> > (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> ° ° °

Public Law 93-380, Title II, 20 U. S. C. § 1701, et seq., provides in pertinent part:

> § 1701 (a) The Congress declares it to be the policy of the United States that—
>
> > (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

• • •

§ 1702 (a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

• • •

§ 1703 No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

• • •

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

• • •

§ 1705 Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin. . . .

§ 1706 An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. . . .

§ 1712 In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1720 For the purposes of this subchapter—

• • •

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin, or within a school on the basis of race, color, or national origin.

• • •

Public Law 93-380, Title VIII, § 844, 88 Stat. 612, provides:

> Sec. 844. The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Regulation:

Federal Regulation, 45 C. F. R. § 86.35 provides:

> A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
>
> (a) Any institution of vocational education operated by such recipient; or
>
> (b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

STATEMENT.

This action was brought on behalf of Petitioner Susan Lynn Vorchheimer, then a student in the ninth grade, by her parents, as guardians ad litem, seeking to enjoin Respondent School District of Philadelphia (School District) from denying Petitioner admission to Central High School solely on the b. 's of her sex.

The School District is an agency of the Commonwealth of Pennsylvania responsible for providing public education in the City and County of Philadelphia. (Pet. 38a.) In so doing, it has established senior high schools. Relevant to this case are the comprehensive and academic senior high schools.

Comprehensive senior high schools "provide a wide range of courses, including those required for college admission, and offer placement classes for students who are intellectually able to progress at a faster than average rate." (Pet. 2a-3a.) Graduates of these schools "have been and are accepted for matriculation by the best and and most prestigious colleges and universities." (Pet. 44a-45a.)[2] Enrollment in the comprehensive senior high schools is usually based on the residence of the student within a designated area. While most of these schools are coeducational, two admit only males and one admits only females. (Pet. 3a.)

The School District of Philadelphia also maintains for the college-bound student two academic high schools which have only college preparatory courses. These schools accept students from the entire City and have high admission standards. Philadelphia High School for Girls

2. Although expressing some dissatisfaction with the education available at her comprehensive high school (Br. 26a-28a), Petitioner was able to qualify for early admission to college after the eleventh grade at that school. (Pet. 5a n. 3.) She is now a first year student at the University of Pennsylvania. (Br. 7 n. 1.)

(Girls High School) admits only females, while Central High School admits only males. Girls High School and Central High School are "academically and functionally equivalent" (Pet. 5a) and are equal in preparing students for college. (Pet. 43a.)

In December 1973 and January 1974, while a junior high school student, Petitioner visited a number of senior high schools in the School District, including George Washington High School, a comprehensive high school in her neighborhood. She also visited Girls High School and Central High School. At Girls High School she "sat in on one of the classes and walked around," (Pet. 41a), thereby formulating an unfavorable "impression" of the school and the thought that she would be "harmed" by attending there. (Pet. 41a.)

Petitioner decided that she wished to attend Central High School. In January 1974 her father submitted, on her behalf, an application for admission to Central High School, which was rejected by the School District solely on the basis of Petitioner's sex. (Pet. 41a-42a.) Petitioner alleges no psychological injury to her from the policy of the School District at issue here. She has recognized that Girls High School has a "reputation of excellence" similar to Central High School (Br. 22a), and admits that Girls High School is an "outstanding school." (Br. 17.)

A class action suit was started in March 1974 in the United States District Court for the Eastern District of Pennsylvania seeking relief under 42 U. S. C. § 1983 from alleged unconstitutional discrimination. After pretrial discovery, including the taking of the deposition of the Superintendent of Schools, a three-day nonjury trial was held in May 1975.

At the trial it was stipulated that single-sex education has a long history and world-wide acceptance and that

there are educators who regard single-sex education as a natural and reasonable educational approach. (Pet. 46a.) In addition, the School District presented expert testimony and exhibits on the educational value of single-sex education. (Pet. 46a-52a.)

The District Court expressed "little doubt" that pursuant to the rational relationship standard set forth by this Court which gives due deference to reasonable legislative classifications, the School District's policy would be constitutional. (Pet. 61a-62a.) As the Court stated:

> "Most likely plaintiff's stipulation that 'the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance' or that 'there are educators who regard education in a single-sex school as a natural and reasonable educational approach' would have proven fatal to her case, Even if this were not so, this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement." (Pet. 62a.)

However, the District Court held that the School District failed to show that the policy in question bears a "fair and substantial relationship" to any of their legitimate objectives. (Pet. 55a-56a.) The Court entered an Order enjoining the School District from refusing to admit Petitioner or any other member of the class she represents to Central High School solely on the basis of sex. (Pet. 86a.)

The School District's application for a stay of Order was denied by the District Court. On appeal, a stay was granted by the Court of Appeals for the Third Circuit,

pending expedited appeal. Petitioners' application to vacate the stay was assigned to the panel designated to hear the case on the merits. The panel vacated the stay with regard to the Petitioner, who was then an eleventh grade student, but not as to the class she represents. Petitioner, however, declined to attend Central High School. She continued at the comprehensive senior high school where she participated in the program for early admission to college (Pet. 5a n. 3), from which she was accepted into the University of Pennsylvania after completion of the eleventh grade. (Br. 7 n. 1.)

The Court of Appeals for the Third Circuit in a two-to-one decision reversed the judgment of the District Court and held that the "regulations establishing admission requirements to Central and Girls High Schools based on gender classification do not offend the Equal Protection Clause of the United States Constitution." (Pet. 16a.) The Court reviewed recent decisions of the Supreme Court and found that in the only cases where statutes were held unconstitutional the rights of the sexes conflicted and those of the female were found to be inadequate. In this case, by contrast, the Court found no allegation of a deprivation of an education equal to that offered to males. (Pet. 12a.) Moreover, the Court determined that "[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure," (Pet. 13a) and that the policy at issue has "its basis in a theory of equal benefit and not discriminatory denial." (Pet. 14a.)

The Court recognized that the Supreme Court's affirmance of *Williams v. McNair*, 316 F. Supp. 134 (D. S. C. 1970), aff'd 401 U. S. 951 (1971) had precendential weight. The Court concluded that the *Williams* case is distinguishable from *Reed v. Reed*, 404 U. S. 71 (1971) in that the restrictive admissions policy in *Williams* applied to both sexes, equally, in contrast to *Reed*, where men received favored treatment.

The Court of Appeals held that:

> "The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship." (Pet. 15a-16a.)

The Court of Appeals did not decide whether the case at bar required application of the rational or substantial relationship tests because, using either, the School District's policy is constitutional. (Pet. 16a.)

The dissenting judge recognized that:

> "Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools." (Pet. 32a.)

In his view, however, the "substantial relation" test applied and was not met by the School District.

Although no allegation of any statutory violation was made in the Complaint, discussed by the District Court, or briefed by the parties, the Court of Appeals requested that

the parties address themselves to certain statutory issues at the oral argument.

The Court found that Public Law 92-318, Title IX, § 901 (1972), requiring that Federally funded programs not discriminate on the basis of sex, excluded the admission policies of secondary schools. 20 U. S. C. § 1681 (Pet. 6a.) The Court concluded that the Equal Educational Opportunities Act of 1974 (P. L. 93-380, Title II), did not prohibit the states from segregating schools on the basis of sex, although there is a specific proscription of segregation based on race, color, or national origin. 20 U. S. C. 1703(a) (Pet. 9a). The Court held, over the disagreement of the dissenting judge, that the wording of the 1974 statute is ambiguous and that research into the legislative history revealed "no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives." (Pet. 11a.)

The Petition for Rehearing was denied by the Court of Appeals on April 12, 1976. (Pet. 36a-37a.)

A Petition for a Writ of Certiorari was filed in July, 1976 to which the School District responded in August, 1976. This Court granted the Petition on October 18, 1976.

SUMMARY OF ARGUMENT.

I

This is not a sex discrimination case. Although the policy of the School District is to maintain two exclusively academic senior high schools which are separated on the basis of sex, and admission to which is by application and not by assignment, the schools, Girls High School and Central High School, offer comparable education (Fact Finding 30; Pet. 45a), and are equal in preparing students for college. (Fact Finding 18; Pet. 43a.) The two schools provide alternatives for college preparatory students, who also have the further option of obtaining a coeducational academic education at the comprehensive senior high schools of the School District. (Pet. 2a-3a.)

II

Girls High School has course offerings of similar and equal quality as Central High School (Fact Finding 27; Pet. 45a), including extensive offerings in the fields of science and mathematics. (D-2.) Girls High School has had its graduates accepted by the best and most prestigious colleges and universities (Fact Finding 25; Pet. 44a-45a) and includes among its alumnae leaders in the community. (Fact Finding 23; Pet. 44a.) A female attending Girls High School is denied no right accorded to males at Central High School. The situation, therefore, lacks the discrimination present in *Reed v. Reed, supra,* since neither sex is extended a benefit by the state to the disadvantage or detriment of the other sex. Furthermore, the notion that there is a constitutional right to a coeducational, exclusively academic education is entirely devoid of legal basis.

III

The Court has affirmed the right of the state to maintain single-sex educational institutions, where, as here, no

discrimination results because students denied access to a particular school are able to obtain an equal education elsewhere within the system. *Williams v. McNair, supra.*

Since the Court has neither held sex to be a suspect classification nor education to be a fundamental right requiring strict scrutiny, the appropriate standard of review is the rational relationship test. That standard requires that the state's system bear some rational relationship to legitimate purposes. *San Antonio Independent School District v. Rodriguez,* 411 U. S. 1 (1973). Here, the Court of Appeals, the dissenting judge, and the District Court all recognized that maintaining Central High School and Girls High School as single-sex educational alternatives bore a rational relationship to a legitimate educational purpose.

IV

The School District has, in fact, proven the reasonableness of offering single-sex schools as an educational alternative. Petitioners stipulated that there are educators who regard education in single-sex schools as a reasonable educational approach. (Fact Finding 33; Pet. 46a.) Moreover, the School District introduced testimony and studies on the educational value of single-sex education, which the District Court found demonstrated that students in single-sex schools have a higher regard for scholastic achievement than their coeducational counterparts. (Fact Finding 46; Pet. 52a.)

The ability of the School District to maintain some single-sex schools directly advances the legitimate goal of providing educational alternatives from which students and their parents may choose. Under the system challenged herein, a student who qualifies may obtain an academic education in either a single-sex or a coeducational high school. Thus, as the Court of Appeals recognized, if single-sex schools are forbidden as an educational alternative the students of the Philadelphia public school system and their parents "would be denied their freedom of choice."

V

The School District's policy is essential to the legitimate goal of allowing flexibility, diversity, and innovation in education. Petitioners admit, and all judges below have recognized, that the methodology at issue is a "natural and reasonable educational approach" with a "long history and world-wide acceptance." As the Court of Appeals held, professional educators must be free to choose among such reasonable and respected alternatives if the "primary aim" of quality education is to be attainable.

VI

The policy of the School District is consistent with Title IX 20 U. S. C. § 1681(a)(1). While Title IX prohibits separation by sex in certain specified educational areas, that prohibition does not extend to secondary schools.

Nothing in the Equal Educational Opportunities Act of 1974 (Public Law 93-380, Title II) prohibits the School District's policy. The School District's conduct in providing equal educational opportunities for males and females is consistent with Congressional policy, as shown by the Congressional mandate to the Department of Health, Education, and Welfare to promulgate regulations implementing Title IX.[3]

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3. Respondents argument that this matter is moot (Brief For Respondents in Opposition to the Petition for Writ of Certiorari at 15-17) is incorporated herein by reference.

ARGUMENT.

I. The School District's Policy of Providing an Opportunity for College Preparatory Students to Attend an Exclusively Academic High School Limited to Members of Their Own Sex Is Not Discriminatory and Is Consistent With the Constitution of the United States.

A. In Offering Females The Opportunity to Attend Girls High School, an Educational Institution Which Is the Equal of Central High School in Preparing Students for College, the School District Does Not Deny Equal Protection of the Laws to Females.

It is clear from the record that quality education is offered on equal terms to the female and the male students of the School District. Any attempt to demonstrate significant differences between the education offered to females and males fails because the two schools in question are in fact equal. (Fact Findings 18; Pet. 43a.)

The District Court found that the education available at Girls High School and Central High School is comparable (Fact Finding 30; Pet. 45a), and that the schools are equal in preparing students for college. (Fact Finding 18; Pet. 43a.) In addition, the schools have comparable admissions standards (Fact Finding 24; Pet. 44a), graduates accepted by the best and most prestigious colleges and universities (Fact Finding 25; Pet. 44a-45a), similar courses of instruction of equal quality (Fact Finding 27; Pet. 45a) and, with the exception of scientific facilities, in which Central was found to be superior, comparable academic facilities. (Fact Finding 26; Pet. 45a.)

Petitioners seek to escalate the finding concerning "scientific facilities" to the position of the "best science education." (Br. 19.) The record does not bear out this

assertion. To the contrary, the District Court found that the courses of instruction at Central High School and Girls High School are "similar and of equal quality." (Fact Finding 27; Pet. 45a.) For example, the record in this case is replete with evidence of the science opportunities available for females at Girls High School. *Facts and Figures 1975*, a publication of the School District in the record (D-2, R. 224, 228), shows the extent of the science and mathematics programs offered at Girls High School. (D-2 at 82.) Among the extensive areas of instruction offered in science at Girls High School are: Advanced Placement Biology, Advanced Placement Chemistry, Carbon Chemistry, Meteorology, Ecology, Genetics, Harvard Project Physics, Science Seminar, and Science Lab Techniques. (D-2 at 82). Advanced Placement Mathematics, Calculus, Independent Study in Algebra and Calculus, and Introduction to Computers are some of the offerings in the extensive mathematics program. (D-2 at 82.) Thus, the science and mathematics offerings are at least equal to those at Central High School. (D-2 at 76.) Moreover, a course by course comparison leads to the conclusion that the course offerings at Girls High may well be superior.[4]

The only evidence in the record for the District Court's finding of "superior scientific facilities" is the testimony of a Central High School student that the school has a classroom planetarium and student-built cyclotron. (Br. 40a.) With that paucity of evidence in the record, and especially in light of the outstanding science program at Girls High School, the Court of Appeals and the Dis-

4. Whereas Girls High School offers sixteen courses in science, Central High School's science offerings total only eight. (Compare D-2 at 82 and 76.) Further, Girls High School offers a program permitting seniors to work on projects of their own design at local institutions, such as hospital laboratories and a college of pharmacy. (Testimony of Dr. R. M. Klein, Principal of Girls High School, R. 230.)

trict Court correctly attributed no significance to those facilities and refused to translate them into "superiority of Central High in the field of science", as petitioners would do. (Br. 18 n. 13.) The dissenting judge, as well, put no weight on the scientific facilities, never mentioning them in his lengthy dissent. (Pet. 17a-33a.) The indisputable fact is that Petitioners have not proven that Central High School offers a scientific education superior to that of Girls High School; rather, the record strongly suggests the contrary.

In their effort to magnify insubstantial differences between Central High School and Girls High School, Petitioners have advanced an argument alleging inequality due to intangible "factors" or "prestige" allegedly associated with Central High School. Neither the Court of Appeals, the dissenting judge nor the District Court was convinced by this unsupported argument. The District Court stated:

> "We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a Constitutional deprivation." (Pet. 58a n. 1.)

Although Central High School has a private endowment, the Court found "no evidence that as a result of this endowment Central's facilities, faculty, or courses of instruction is superior to Girls." (Fact Finding 28; Pet. 45a.)

As Petitioners admit, Girls High School is indisputably an "outstanding school." (Br. 17.) Indeed, the District Court found that Girls High School has a large number of graduates who are influential in business, professional or academic affairs, and whose numbers include community leaders among whom are three local judges and a vice

president of the American Medical Association. (Fact Finding 23; Pet. 44a.) Testimony revealed that the Girls High School Alumnae Association has contributed substantial sums of money creating college scholarships for Girls High School students. (Testimony of Dr. R. M. Klein, Principal of Girls High School, R. 232.)

Even if Girls High School's list of "influential graduates" may not be as extensive as Central High School's, that is not a reflection on Girls High School but rather on the unfortunate history of sexism in this society. Importantly, in producing community leaders, including members of the judiciary, an officer of the American Medical Association and influential persons in business, professional and academic affairs (Fact Finding 23; Pet. 44a), Girls High School has contributed significantly to eliminating outmoded sexual stereotypes. The Court may take judicial notice that every student leader, every newspaper editor, every member of student council, etc., at Girls High School is a female, thereby helping immeasurably to erase the old notions that some roles are not appropriate for women. Petitioners have described the history of Girls High School as "inspiring to a student of the women's movement" (Petitioners'—therein Plaintiffs—Brief to the District Court at 12), and that is a fair assessment of the contribution of the school. Thus it is ironic that Petitioners now seek to undermine this continuing inspiration to female educational accomplishment.

Petitioners place mistaken reliance on *Sweatt v. Painter*, 339 U. S. 629 (1950), a case involving the refusal to admit a student to the preeminent law school in Texas because of his race. That case can be distinguished from the one at bar on several grounds. As *Sweatt* involved race it is inapplicable to a case concerning classification on the basis of sex, for as the Court of Appeals stated in distinguishing *Sweatt* and *Brown v. Board of*

Education, 347 U. S. 483 (1954): "Race is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender." (Pet. 13a.) As numerous decisions of this Court have held, forced racial segregation necessarily engenders a sense of inferiority. In contrast, as the District Court found (Pet. 58a), maintaining a limited number of voluntary, single-sex schools as an educational alternative has no such effect when comparable educations are offered at the all-male and all-female schools.

Moreover, the disparity in treatment accorded *Sweatt* as to law schools is distinguishable from Petitioners' position herein for additional reasons. The law school in *Sweatt*, to which blacks were relegated, was not yet accredited, and was in many objective factors clearly inferior: number of faculty, variety of courses and opportunity for specialization, size of student body and availability of the law review and similar activities. 339 U. S. at 633-4. The Court there found no "substantial equality" in the educational opportunities offered the two races. 339 U. S. at 633. In this case, by contrast, Girls High School has been found equal to Central High School in preparing its students for college, (Fact Finding 18; Pet. 43a), and "academically and functionally equivalent" to Central High School. (Pet. 5a.)

There is nothing in the record here to suggest that intangibles are as vitally important in a high school as the Court in *Sweatt* found to be the case in law schools. Nor is there any basis to conclude that Girls High School's very substantial quantum of intangibles leaves its students deprived in any way whatsoever. Moreover, Petitioner's testimony indicates that she was motivated to apply to Central High School *not* by its intangibles but by its reputation for "academic excellence" (Br. 25a), although even she admitted that Girls High School has a similar "reputation of excellence." (Br. 22a.) The District Court found *as a fact*, that Girls High School is the academic equal of Central High School (Fact Finding 18; Pet. 43a and Fact Finding 30; Pet. 45a), and that no relevant difference in intangibles exists between the two schools. (Pet. 58a n. 1.) Furthermore, the District Court found that graduates of Girls High School "have been and are accepted for matriculation by the best and most prestigious colleges and universities." (Fact Finding 25; Pet. 44a-45a.) Thus, this case is readily and strikingly distinguishable from *Sweatt* and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U. S. 637 (1950).

B. The School District's Policy of Treating the Sexes Similarly by Providing to Both Sexes the Opportunity for Equal Education at Single-sex Academic Senior High Schools Does Not Violate the Fourteenth Amendment Since There Is No Unequal Treatment of Either Sex.

The School District's policy at issue has the same effect on both sexes. As the Court of Appeals below stated: "[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure." (Pet. 13a.)

Thus, a male could have made the assertion that Petitioners did in the Complaint by alleging that the School District discriminates against:

> "[q]ualified students who attend or in the future may choose to attend the academic high schools since it denies them the benefit of co-educational learning experience available to other students in the school system. . . ." (Br. 11a para. 23.)

This Court has never found there to be a "right" to a coeducational, exclusively academic education. More-

over, in light of the Court's decision in *San Antonio Independent School District v. Rodriguez, supra,* holding that education is not a fundamental right under the Constitution, no allegation of a Constitutional right to a coeducational exclusively academic school can be seriously asserted. Where, as here, the benefits and burdens of governmental policy are distributed equally to all the people there is no meritorious claim by any individual of deprivation of equal protection of the laws. *Palmer v. Thompson,* 403 U. S. 217 (1971).

The cases cited by Petitioners, *Reed v. Reed, supra, Frontiero v. Richardson,* 411 U. S. 677 (1973), *Weinberger v. Wiesenfeld,* 420 U. S. 636 (1975), and *Stanton v. Stanton,* 421 U. S. 7 (1975), do not support the result for which they contend. Each of these cases, unlike the case at bar, involved harmful discrimination against women resulting from governmental action grossly over—or underclassifying on the basis of sex.[5] The would-be administratrix in *Reed,* the female service-woman with the dependent husband in *Frontiero,* the deceased woman whose spouse received no payments in *Wiesenfeld,* and the female who stopped receiving support payments in *Stanton* are all similar in that they were denied a benefit accorded to their male counterparts for reasons unrelated to their needs or abilities.

By contrast the females in this case are denied no benefit accorded to males. Both females and males are afforded an equal academic education by the School District and neither males nor females are able to go to a coeducational high school offering solely an academic curriculum. Moreover, the criteria for admission to Girls High School and Central High School are identical. Cf. *Bray v. Lee,* 337 F. Supp. 934 (D. Mass. 1972). The

5. *See* Johnson, *Sex Discrimination and the Supreme Court—1975,* 23 UCLA L. Rev. 235, 261 (1975).

maintenance of Central High School and Girls High School as single-sex schools is based upon respected educational principles which the Philadelphia School Board, the local body charged with responsibility for public education, has found to pertain to adolescent students of both sexes. (Opinion of the District Court, Pet. 80a.) [6]

C. The Maintenance of Public Educational Institutions Admitting Only Members of One Sex Has Been Upheld by This Court in a Case Not Distinguishable From the Case at Bar.

This Court has affirmed the right of a State to use gender classifications in its school admission policy where equivalent educational opportunities are available to both sexes. *Williams v. McNair,* 316 F. Supp. 134 (D.S.C. 1970), aff'd 401 U. S. 951 (1971). There were no dissents on the merits of the affirmance by the Court. (Mr. Justice Harlan would have remanded on procedural grounds.) *Williams v. McNair* and this case are indistinguishable in pertinent aspects. Though males were denied admission into all-female Winthrop College in *Williams,* they had available educationally equivalent alternatives in the form of other state-supported colleges. 316 F. Supp. at 138. Here Petitioners may choose to attend Girls High School, which is the equal of Central High School in preparing students for college (Pet. 43a), or they may decide to go to a coeducational comprehensive high school offering among its courses a complete academic curriculum including advanced placement classes for students who are intellectually able to progress at a faster than

6. While the School District made no argument based on archaic, or "sexist" concepts about women, Petitioners' expert did in supporting his preference for coeducation. He testified:

"I think it is just nice to have young ladies about the campus myself." (R. 30.)

average rate. (Pet. 2a-3a.) Accepting either alternative, Petitioners do not suffer discriminatory treatment. She is in the same position as the males in *Williams* who are denied the opportunity to attend a specific school but not deprived of an opportunity to obtain an equal education. (Pet. 5a.) The neutral aspect of the School District's policy is evident from the fact that boys cannot gain admission to educationally equal, all-female Girls High School.[7]

In *Williams v. McNair* the Court held that a legislative classification creating single-sex schools was premised on respectable pedagogical opinion and did not violate the Equal Protection Clause of the Fourteenth Amendment. 316 F. Supp. at 138. This Court's affirmance of *Williams v. McNair* is a decision on the merits of the case. *Hicks v. Miranda*, 422 U. S. 332 (1975). *Williams* is thus directly on point and this Court should grant similar deference to the reasonable pedagogical policy behind the continued maintenance of equal single-sex academic high schools in Philadelphia.

7. *Williams* distinguished *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E. D. Va. 1970). In *Kirstein* a three-judge District Court held that denial of admission to females to the University of Virginia at Charlottesville, the largest and most diverse educational institution in the State, denied women educational opportunities not afforded elsewhere. The *Kirstein* Court stated: "Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere." 309 F. Supp. at 187. *Kirstein* was distinguished in *Williams* on that basis. 316 F. Supp. at 138. Similarly, both the District Court and the Court of Appeals in the case at bar found *Kirstein* easily distinguishable because of the equality of Central and Girls. The District Court noted the academic inferiority of the state supported colleges available to women in *Kirstein*, as distinguished from the equal educational opportunities here available. (Pet. 78 n. 5.) The Court of Appeals in the instant case stated, as to Girls and Central, "[t]he factual findings establish that, for many years past and at the present, excellent educational facilities have been and are available to both sexes." (Pet. 15a and 15a n. 9.) *Kirstein's* facts thus clearly distinguish it from this case.

II. Under Either the Rational Relationship Standard or the Fair and Substantial Test the School District's Policy of Providing an Opportunity for College Preparatory Students to Attend an Academic School for Their Own Sex Is Constitutional.

A. No Standard of Strict Judicial Scrutiny Is Applicable in This Matter as No Suspect Class or Fundamental Right Is Involved.

The proposition that legislative classification by sex is inherently suspect, warranting strict judicial scrutiny and compelling state justification, has never commanded the assent of a majority of this Court. See *Stanton v. Stanton, supra* at 13; *Weinberger v. Wiesenfeld, supra; Schlesinger v. Ballard*, 419 U. S. 498 (1975); *Kahn v. Shevin*, 416 U. S. 351 (1974); *Frontiero v. Richardson, supra; Reed v. Reed, supra.* Indeed, as recently as *Craig v. Boren*, 45 U. S. L. W. 4057 (December 20, 1976), this Court did not apply strict scrutiny in a case involving disparate treatment of men and women. Nothing in the history or rationale of the Fourteenth Amendment's Equal Protection Clause compels the invalidation of all gender-based classifications. Indeed, as the Court recently observed, "gender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin, supra* at 355, n. 10. Petitioners do not ask the Court to reassess that position.

The strict standard of review is not applicable in a matter involving education. The Court has held that education is not within the limited category of rights recognized to be fundamental under the United States Constitution. *San Antonio Independent School District v. Rodriguez, supra.*

B. The Appropriate Standard of Review in This Matter Is the Rational Relationship Test.

The standard of review applicable here is whether the School District's policy bears some rational relationship to a legitimate state purpose. In *Williams v. McNair, supra,* a case clearly in point, this Court upheld a legislative classification establishing colleges separated on the basis of sex. The District Court had tested the statute against the rational relationship standard and held that the classification, being premised on respected pedagogical opinion, did not deny equal protection. 316 F. Supp. at 138.

A standard more rigorous than the rational relationship test has never been applied where the sexes are accorded *equal* treatment as in the case at bar. This is what differentiates this case from *Reed v. Reed, Frontiero v. Richardson, Weinberger v. Wiesenfeld, Stanton v. Stanton,* and *Craig v. Boren.* In each of those cases, the sexes were afforded disparate treatment; here men and women are provided with equal educational opportunity. *Reed, Frontiero, Wiesenfeld* and *Stanton* each involved a statutory scheme which the Court found to deny equal protection either because based on mere administrative ease and convenience or because based upon "old notions" of sex stereotypes.[8]

The instant case involves separation of the sexes as an alternative for respected pedagogical purposes, but the crucial fact is that males and females are treated equally. The last case in which a similar set of conditions was before this Court was *Williams v. McNair, supra,* in which

8. Compare *General Electric Co. v. Gilbert,* 45 U. S. L. W. 4031 (December 7, 1976), and *Geduldig v. Aiello,* 417 U. S. 484 (1974) which concerned classifications adversely affecting women alone but not gender-based. In each of these cases, the Court deemed it sufficient that a rational relationship was demonstrated, in the absence of disparate treatment based upon gender.

the Court affirmed without opinion the finding of a three-judge District Court that the statute in question did not deny equal protection where the rational relationship standard was satisfied.

More recently, in *Schlesinger v. Ballard, supra,* the Court applied the rational relationship test where there was differing treatment between the sexes, but that differing treatment was found to reflect "not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U. S. at 508. (Emphasis in original).

In the instant case where there is (a) no showing of disparate treatment between the sexes and (b) no showing that the classification is based upon "old notions," or archaic and overbroad generalizations, there is no reason to subject the classification at hand to the "substantial" test or any other standard more rigorous than the rational relationship test.

C. The School District's Policy Serves Legitimate Governmental Interests and Thereby Meets This Court's Standards for a Constitutional Classification.

1. Under the Traditional Standard of Review the State Needs to Show That Its Policy Bears Some Rational Relationship to Legitimate State Purposes.

On many occasions this Court has articulated the proper standard of review under the rational relationship test:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard

> of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District v. Rodriguez, supra* at 40.

Indeed, this Court has emphasized the necessity of granting due deference to the state under the rational relationship test by holding that the constitutionality of governmental action is presumed "even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their [the legislature's] statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald v. Board of Election Commissioners,* 394 U. S. 802, 809 (1969). *McGowan v. Maryland,* 366 U. S. 420 (1961).

2. All of the Judges Who Have Reviewed This Matter Have Recognized the Legitimacy of the School District's Policy.

With respect to the traditional rational relationship standard, the District Court said: "There can be little doubt that under this standard the School Board's policy of maintaining Central as an all-boys' school would pass constitutional muster." (Pet. 62a.) The dissenting judge in the Court of Appeals recognized that:

> "Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools." (Pet. 32a.)

The Court of Appeals held that the gender-based admissions requirements to Central High School and Girls High School are constitutional under either the rational or substantial relationship tests, because measures allowing innovation in methods and techniques to achieve the "primary goal" of a quality education have a "high degree of relevance" to a legitimate educational purpose. (Pet. 15a.)

3. The Record Contains Sufficient Grounds for This Court to Determine That the School District's Policy Satisfies Both the Rational and Substantial Relationship Standards.

The record is replete with evidence to substantiate the findings of the Court of Appeals that the policy at issue in this case meets any relevant Constitutional standard. Petitioners stipulated that:

> "The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance." (Fact Finding 32; Pet. 46a.)
>
> "There are educators who regard education in a single-sex school as a natural and reasonable educational approach." (Fact Finding 33; Pet. 46a.)

In addition, the evidence introduced by the School District further demonstrated the educational value of single-sex schools. (Fact Finding 34-46; Pet. 46a-52a.)

Petitioners mistakenly assert that the School District attempts to prove "the superiority of single-sex education." (Br. 40 n. 45). Moreover, Petitioners now attempt to introduce into the case material not in the record to impeach their own stipulation concerning the reasonable-

ness of single-sex schools.[9] The School District's effort, however, was aimed at showing that single-sex education, though not the only method of educating, is reasonable, worthy of retention as an alternative and, thereby, highly relevant.

It is undisputed that single-sex education counts among its adherents educators who regard the approach as "natural and reasonable." (Pet. 46a.) A study introduced by the School District by testimony of the author, Dr. J. Charles Jones (D-1, R. 159, 160) was found by the District Court to demonstrate that students of both sexes in single-sex schools have a higher regard for scholastic achievement and are more likely to spend time on homework than their coeducational counterparts. (Fact Finding 46; Pet. 52a.)

Indeed, Petitioners' expert rebuttal witness testified that he could find no fault with the methodology of the "Jones' study" and that:

> "The results suggest that some students may have more positive attitudes towards learning in single-sex schools." (R. 216.)

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9. *See e.g.* Petitioners' Brief at 36 n. 36. If, however, this Court is to consider material not in the record, the Court's attention is directed to the results of a very recent study in the education journal *Phi Delta Kappan:*

> "These findings support the idea that adolescent girls find it threatening to succeed in male-dominated areas. Success in such areas could result in negative social consequences. These perceptions of negativism increase as girls become more aware of and interested in hetrosexual relationships. Girls are apt to compete freely with boys through the elementary grades, but begin to feel increasingly inhibited during early adolescense as they seek social acceptance by boys."

Lavach and Lanier, *The Motive to Avoid Success in High-Achieving Girls, Grades 7-12,* 58 *Phi Delta Kappan* 357 at 358 (December 1976).

Thus the debate over the merits of coeducation, particularly as applied to adolescent females, continues.

One of the School District's specific goals is "providing educational options to students and their parents." (Fact Finding 49v; Pet. 53a.) Providing the alternative opportunity to attend single-sex schools advances that goal. While the proper goals of a system of public educational are an "unsettled controversy," *San Antonio Independent School District v. Rodriguez, supra* at 43, one could hardly object to the Court of Appeals assessment that:

> "The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance." (Pet. 15a.)

The ability of the School District to maintain some single-sex schools directly advances the legitimate goal of providing educational alternatives from which students and their parents may choose. Under the system challenged herein, a student who qualifies may obtain an academic education in either a single-sex or a coeducational high school. Thus, as the Court of Appeals recognized, if petitioners prevail the students of the Philadelphia public school system and their parents "would be denied their freedom of choice." (Pet. 16a.)

The School District asserted to the Court of Appeals that the District Court clearly erred in Fact Finding 51 (Pet. 54a), that "no other high school in Philadelphia offers the range of courses available at Central or Girls." Cited to the Court were evidence in the record, testimony, and the District Court's own Fact Finding 25 (Pet. 44a-45a), which showed the error of that Court in Finding 51. (Brief of Respondents—therein Appellants—to Court of

Appeals at 20-22.) The Court of Appeals appears to have reversed the District Court's finding because, in referring to the comprehensive high schools, it stated:

> "Comprehensive schools provide a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are intellectually able to progress at a faster than average rate." (Pet. 2a-3a.)

Thus, the School District does provide its college-bound students with options, consistent with one of its specific goals. Existence of some imperfection in the manner in which that goal is achieved is not ground for striking down the entire system. *San Antonio Independent School District v. Rodriguez, supra* at 51.

4. A Finding for Respondents in This Case Is Critical to the Preservation of the Opportunity for Local School Boards to Continue to Employ a Respected Educational Methodology.

As the Court of Appeals recognized, if Petitioners prevail "then all public single-sex schools would have to be abolished." (Pet. 16a.) That would be damaging to students, their parents and school personnel since it would make unavailable to them a "respected educational methodology." (Pet. 16a.)

It would perhaps be most unfortunate for females, since a study has shown that there is a direct, negative relationship between the number of men students present at a college and the number of women "achievers" graduating from the institution. (Fact Finding 35; Pet. 47a.) The author of that study, Dr. M. Elizabeth Tidball of

George Washington University, testified that it would be reasonable to apply the findings of that study to the secondary school, including the academic high school level. (Fact Finding 38; Pet. 47a.)

Petitioners make much of the trend to coeducation. Since that trend is based at least in part on economic factors, (R. 29) it is dubious weight in support of the elimination of single-sex public schools as an alternative in Philadelphia and elsewhere. To the contrary, the School District's policy is essential to the legitimate goal of allowing flexibility, diversity, and innovation in education. Petitioners admit, and all judges below have recognized, that the methodology at issue is a "natural and reasonable educational approach" (Pet. 46a) with a "long history and world-wide acceptance." (Pet. 46a.) As the Court of Appeals held, professional educators must be free to choose among such reasonable and respected alternatives if the "primary aim" of quality education is to be attainable. (R. 15a.)

5. The School District's Ability to Pursue Its Policy Is Highly Relevant to the Continuation of Local Control Over Public Education Which This Court Has Recognized to Be Vitally Important.

The ability of the School District to maintain flexibility in educational methodology is consistent with this Court's holdings recognizing that school authorities are entitled to a significant degree of deference in the performance of their duties. This Court stated in *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968):

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene

> in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

This Court has recognized and has repeatedly held that educational questions are best left to educators and local school boards. *San Antonio Independent School District v. Rodriguez, supra* at 42. In permitting the School District in this case to choose differing methodologies in providing an equal education to all students, the Court of Appeals was completely consistent with decisions of this Court recognizing the importance of local control over education. As this Court recently stated:

> "No single tradition in public education is more deeply rooted than local control . . . [it has] long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley,* 418 U. S. 717, 741-42 (1974).

Indeed, local control in the educational process provides the citizen with the opportunity to participate in the decision-making process, structuring school programs and encouraging "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Independent School District v. Rodriguez, supra* at 50.

Petitioners are asking the Court to reverse its traditional view and to use the Fourteenth Amendment as a means of transferring non-discriminatory educational policy decisions from the local school boards to the Federal courts because Petitioners do not like or agree with the policy. This attempt, if successful, would freeze educational methodology into Petitioners' mold even though an alternative policy commands respect. If it is Petitioners' desire to change educational policy, their proper forum is the local school board, not the courts.

As this Court has recognized, problems surrounding education continue to consume the time and tax the wisdom of scholars in the field. What the Court said in the context of educational funding applies, as well, to the problem herein, which all admit is one of educational debate:

> "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District v. Rodriguez, supra* at 43.

III. The School District Is in Compliance With Federal Statutory Law in Maintaining Two Equal, Exclusively Academic Schools Separated on the Basis of Sex.

The School District is not prohibited by any Federal statute from maintaining Girls High School and Central High School as single-sex institutions. At both schools students apply for *admission;* no student is assigned to either school. The decision to attend an exclusively academic school is the student's, who applies to the academic school for his or her own sex (Fact Finding 8; Pet. 40a), and meets certain academic criteria (Fact Finding 7; Pet. 40a). Moreover, the School District does not operate a *dual school system.* As the Court of Appeals found (Pet.

3a), and as Petitioners acknowledged (Br. 40 n. 45) most of the schools of the school district are coeducational.

A. The School District Is in Compliance With Title IX Which Does Not Prohibit Secondary Schools From Denying Admission of Students to Schools on the Basis of Sex.

Title IX of Public Law 92-318, as amended (Title IX) permits the School District to maintain its policy of admissions criteria based on sex, because it specifically excludes secondary schools:

> "(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;" (20 U. S. C. § 1681(a)(1).)

Since the issue before the Court concerns *admission* (not assignment) to school, and since Title IX excludes the admissions policies of secondary schools from its coverage, the Court of Appeals correctly held that the School District committed no statutory violation. (Opinion of the Court of Appeals, Pet. 6a and 11a.)

B. The Equal Educational Opportunities Act of 1974 Does Not Abrogate or Modify the Exemption Granted in Title IX Allowing Secondary Schools to Establish Admissions Criteria Based on Sex.

Petitioners assert that the Equal Educational Opportunities Act of 1974 (Public Law 93-380, Title II, § 202, et seq., 20 U. S. C. § 1701, et seq.) provides the Court with support for the judgment of the District Court. However, that law does not prohibit the conduct of the School District in establishing the *admissions* policies herein, and is consistent with Title IX's exemption of secondary school admission policies. The Equal Educational Opportunities Act states:

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;" (20 U. S. C. § 1703(a).)

Thus, though segregation on the basis of race, color, or national origin is prohibited, there is no proscription of segregation on the basis of sex.

Furthermore, evidence of a Congressional intent to extend Title IX's exemption of secondary school admissions policies is found within Public Law 93-380, the law containing the Equal Educational Opportunities Act of 1974. In Section 844 of Public Law 93-380 Congress directed the Secretary of Health, Education, and Welfare to prepare regulations implementing Title IX:

> "The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the

provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Public Law 93-380 § 844, 88 Stat. 612.

The regulations authorized by the above section became effective on July 21, 1975, and provide in pertinent part:

> "A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
>
> (a) Any institution of vocational education operated by such recipient; or
>
> (b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." (45 C. F. R. § 86.35 (1976).)

Thus, under the regulations promulgated pursuant to Public Law 93-380 and Title IX, the continued maintenance of *equal* single-sex schools is permitted.

The fact findings concerning Girls High School and Central establish equality between the schools (Fact Findings 18, 24, 25, 26, and 30; Pet. 43a-45a) and clearly indicate that the School District is in compliance with the regulations.[10]

10. To the extent that the scientific facilities differ, the record reveals only that Central High School has a student-built cyclotron

Public Law 93-380 thus did not amend or qualify Title IX. There is no "positive repugnancy" between the statutes, and therefore Title IX's exemption of secondary schools, recognized in Public Law 93-380, has not been abrogated or qualified. *See Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974).

The unlawful practice in 20 U. S. C. § 1703(c) cited by Petitioners (Br. 41) refers to "assignments" and thus clearly does not apply here. That section states:

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> • • •
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate

10. (Cont'd.)
and a classroom planetarium. (Br. 39a-40a.) If this Court should find (unlike the Court of Appeals, the dissenting judge, or the District Court) that the existence of these two apparatus is significant, the appropriate remedy would not be for the Court to require Central High School to admit females, but to order the School District to provide the items to Girls High School. 20 U. S. C. § 1712. Moreover, there is no evidence in the record that comparable or superior science facilities are not available at other schools in the School District, including the high school attended by Petitioner or the high school which is a "magnet" for science education.

> grade level and type of education for such student;" (20 U. S. C. § 1703(c).)

Here, Petitioner was not *assigned* to Girls High School. She was assigned to her neighborhood school (Fact Finding 10; Pet. 40a), a coeducational school which had the appropriate "type of education" for her, i.e. "advanced placement classes for students intellectually able to progress at a faster than average rate" (Opinion of the Court of Appeals, Pet. 2a-3a), and, significantly, Petitioner was able to qualify for early admission to college from that school. (Pet. 5a n. 3.)

Moreover, Petitioner clearly was not assigned to her neighborhood coeducational high school "for the purpose of segregating students on the basis of . . . sex . . .". 20 U. S. C. § 1705.

Thus, the School District does not commit any "unlawful practice" under the Equal Educational Opportunities Act.

Moreover, the School District is in conformity with Congressional policy in 20 U. S. C. § 1701:

> "(a) The Congress declares it to be the policy of the United States that—
>
> > (1) All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
> >
> > (2) The neighborhood is the appropriate basis for determining public school assignments."

Here, there are factual findings of the equal educational opportunities offered to the females and the males.

(Fact Finding 18; Pet. 43a, Fact Finding 30; Pet. 45a.) Also the School District assigned Petitioner to her "neighborhood" school. 20 U. S. C. § 1701(a)(2).

In 20 U. S. C. § 1702 the Congress found that "the maintenance of dual school systems in which students are assigned to school solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the Fourteenth Amendment." 20 U. S. C. § 1702 (a)(1). While the term "dual school system" is not defined in the law, the term can not be construed to mean the operation of single-sex alternatives, such as Girls High School and Central High School within a system otherwise largely coeducational. As defined by 20 U. S. C. § 1720 "segregation" does not occur unless students are "wholly or substantially separated among the schools":

> "(c) The term 'segregation' means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin, or within a school on the basis of race, color, or national origin."

As Petitioners admit, the vast majority of schools in the system are coeducational. (Br. 40 n. 45.) [11]

Finally, even assuming *arguendo* that Congress sought to establish a constitutional standard in 20 U. S. C. § 1702(a)(1) that *assignment* to school on the basis of sex violates the Fourteenth Amendment, that "standard" cannot be interpreted to *per se* prohibit single-sex schools

11. Petitioners did not seek to amend the Complaint (Br. 5a-12a) to include relief under the Equal Educational Opportunities Act, although an Amendment was sought at the trial on other grounds. (R. 2-3, Pet. 55a, paragraph 2.) Since the Act provides that "[a]n individual denied an equal education opportunity . . . may institute a civil action in an appropriate district court . . ." (20 U. S. C. § 1706), and since such action was not instituted, the Court has no jurisdiction over Petitioners' claim now asserted.

because the operative portions of that statute plainly omit any such ban. 20 U. S. C. 1703(a). Further, the prior relevant statute, Title IX, 20 U. S. C. § 1681(a)(1), excluded a prohibition of single-sex secondary schools. In any event, by its plain language 20 U. S. C. § 1702 (a)(1) would not apply to single-sex public schools such as Central High School and Girls High School to which admission is by choice and not by assignment and which are part of a single, coeducational school system.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-37.

SUSAN LYNN VORCHHEIMER, by Her Parents BERT and CAROL VORCHHEIMER, Guardians Ad Litem, on Her Own Behalf and on Behalf of All Others Similarly Situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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I. INTRODUCTION.

This case is not a generalized challenge of sex segregated public education. The only question presented here is whether Central High School of Philadelphia may continue to deny admission to otherwise qualified female students solely on the basis of their gender. A decree admitting petitioners to Central—the most distinguished educational facility in the Philadelphia Public School System—would in no way preclude the School District from continuing to operate other single sex schools.

Since *Reed v. Reed*, 404 U. S. 71 (1971), this Court has consistently held that classifications based upon sex violate the Equal Protection Clause unless they are proven to be substantially related to the achievement of important governmental objectives. See *Craig v. Boren*, 97 S. Ct. 451, 457 (1976). The trial court below applied this test and, after identifying the School District's stated objectives and examining the proffered justifications with reference to their application to Central High School, found that the exclusion of female students from that institution was not fairly and substantially related to any of the Respondents' legitimate goals.[1] This Court need go no further to vindicate the constitutional rights asserted here.

Central High School is unique because it is the premier school in the Philadelphia public school system, with the richest history and the highest reputation. Central and its all-female sister institution, The Philadelphia High School for Girls, are the only academic high schools in the School District. The trial court found that the education available at other high schools is not as well suited to the needs of the students who qualify for admission to the

1. The court of appeals did not overturn any of these findings. Instead, it's decision obscured the particulars of this case, addressing instead the question of whether "every public school . . . in the Nation [must] be coeducational." (Pet. 2a).

academic schools. Consequently, these students are offered a coeducational alternative only to the extent that they are willing to forego significant educational benefits.

Central's high academic qualifications for admission define its student body, and members of the Plaintiff class,[2] as potential leaders in all fields in which educational achievement is a factor. Young men and women who meet these criteria of excellence and share the same career aspirations are denied an important educational benefit by being deprived of the opportunity to engage in the free exchange of ideas within the classroom setting. It is the young women, however, who suffer the most from the Respondents' policy of segregating its superior students on the basis of sex. Exclusion from the only truly elite public educational institution, which is preserved for members of the dominant class, necessarily impedes their opportunity to enter into the mainstream of the economic and political life of the community.

For all of these reasons, the exclusion of female students from Central High School represents the clearest and most compelling situation in which classification on the basis of sex fails to meet the requirements of the Equal Protection Clause.

2. Only 7% of the students in the School District meet the qualifications for admission to the academic high schools. This case is maintained as a class action on behalf of "all those females who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." Pet. 55a.

II. ARGUMENT.

A. The Equal Protection Analysis Set Forth in Reed v. Reed and Its Progeny Is Applicable to This Case.

In *Craig v. Boren, supra,* this Court's most recent decision regarding application of the Equal Protection Clause to gender based classifications, the Opinion of the Court summarizes the current state of the law as follows:

> Analysis may appropriately begin with the reminder that *Reed v. Reed, supra,* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." . . . To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives, and must be substantially related to achievement of those objectives. (at 457)

Respondents contend that the separation of the sexes in public schools is exempt from scrutiny, or requires only a minimal level of justification, as long as substantially equal educational programs are provided for both males and females.[3] Their theory, as articulated by the majority of the court of appeals below, holds that: "If there are

3. In support of this analysis Respondents place great reliance upon the per curiam affirmance in *Williams v. McNair,* 401 U. S. 951 (1971), affirming 316 F. Supp. 134 (D. S. C., 1970). *Williams* is distinguishable from the present case because it does not involve exclusion of females from an institution maintained for the dominant (male) gender, (see Petitioners' Brief p. 30-32; cf Stevens concurring and Renquist dissenting in *Craig, supra*), and because the court there found that the state college system provided equal educational opportunity at other schools on a co-educational basis. In addition, the three-judge court in *Williams* applied the permissive rational basis test in reliance upon *Goesaert v. Cleary* (335 U. S. 464) a 1948 decision disapproved in *Craig, supra.* See fn 23 at p. 463.

benefits or detriments inherent in the system, they fall on both sexes in equal measure." (Pet. 14a).[4] The obvious response to this argument is, as this Court stated in *Shelly v. Kraemer,* 334 U. S. 1 at 22 (1948): "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Moreover, the observation that members of both genders are afforded the same treatment in being separated from each other, does not establish that the effect is the same upon both groups.

Public education is not the first, but rather the last, area of state regulated activity in which arbitrary discrimination should be countenanced. As this Court recognized in the landmark decision of *Brown v. Board of Education:*

> Today, education is perhaps the most important function of state and local governments. . . . In these days it is doubtful that any child may be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . . (347 U. S. 483 at 493 (1954))
>
> We conclude that in the field of public education the doctrine of separate but equal has no place. (id at 495)

Petitioners do not contend that gender based classifications in education are totally analogous to those based upon race. There may, indeed, be situations in which sex is a permissible basis for difference in treatment within a public school program. We assert only that such classifications are not presumptively valid, but must meet the standard

4. Judge Gibbons, in his dissenting opinion in the court of appeals, accurately characterized this "equal benefit" rationale as the "twentieth century sexual equivalent" of *Plessy v. Ferguson,* 163 U. S. 537 (1896). Pet. 17-18a.

of scrutiny set forth in *Reed, supra,* and developed in *Craig, supra,* and the intervening cases.

B. Exclusion From Central High School Denies Academically Gifted Female Students Educational Opportunity Equal to That Afforded to Similarly Situated Male Students.

Respondents contend that members of the Plaintiff class are afforded educational opportunity equal to that available at Central High School either at Girl's High School, in a single-sex environment, or at their neighborhood comprehensive high school, in a co-educational setting. Their assertion that the education available at the neighborhood schools is equivalent to that provided at Central is contradicted by the explicit finding of the trial court that:

> Central and Girls' offer their students an experience which is more intensely intellectual and a better prepartion for the atmosphere of a good liberal arts college than is offered by any of the non-academic high schools. (Finding 51)

This finding was not disturbed by the court of appeals. It is confirmed not only by the experience of Petitioner Susan Vorchheimer in attending George Washington, one of the most highly rated neighborhood schools, but also by the testimony of one of the Respondent's own witnesses, Dr. Ruth Kline, who stated that the academic high schools provide the education best suited to the needs of the students who meet their admission requirements (NT 239-40).

The only high school which is in any way comparable to Central is the Philadelphia High School for Girls, the corresponding academic high school with an all-female ad-

mission policy. The district court, after excluding from consideration all of Central's advantages which did not have a direct bearing upon the level of class-room instruction [5] found "the education available to the female students at Girls is comparable to that available to male students at Central" (Finding 30). But, as is noted in the Memorandum of the United States as *amicus curiae* filed by the former Solicitor General (pp. 22-23) "the district court also recognized that very real differences exist between the two schools. The findings of fact, none of which have been disturbed by the court of appeals, establish that Central High School has superior science facilities, a more extensive library, a more prominent body of graduates, an enhanced reputation, and a greater endowment." [6] Central, unlike any other school in the Philadelphia public school system, exemplifies all of those characteristics which this Court in *Sweat v. Painter*, 339 U. S. 629 (1950), identified as making for greatness in an education institution. In addition to establishing the importance of these intangible factors, the Court in *Sweat*, and in its companion case, *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U. S. 637 (1950), recognized that the "free exchange of ideas" with members of the dominant class is an essential part of the preparation for a leadership role in

5. The Court noted that Central is the only high school with a substantial private endowment, the Barnwell Foundation, and that this fund was responsible for bringing to school functions such notable political leaders as then Attorney General Robert Kennedy and then Vice President Hubert Humphrey. However, these advantages were specifically excluded from the limited definition of education utilized for purposes of Finding 30.

6. The memorandum describes at length differences between the schools found by the trial court. Other evidence of the differences between the two schools not specifically noted in the district court opinion are Central's ability to attract a higher percentage of the most talented students and its lower teacher absence rate. See Exhibit A of this Brief.

society.[7] All of these factors are legally relevant in determining whether the exclusion of females from Central High on the basis of their sex denies the Plaintiff class a significant public benefit in violation of the Equal Protection Clause.[8]

C. Remand Is Not Appropriate.

The Memorandum filed by the United States as *amicus curiae*, makes careful inventory of the "very real differences" between Central, from which Susan Lynn Vorchheimer and her class have been excluded because they are female, and Girls High, to which respondents have sought to remit them. Memorandum for the United States as *amicus curiae*, pp. 23-5.

But, after documenting the acknowledged "disparities" (*id.* at p. 28)—in, e.g., facilities, character of diploma, endowment, prestige—between these institutions, the Memorandum then urges remand for inquiry into whether these disparities have an impact with respect to subsequent opportunities for educational and professional advancement.

With all respect, petitioners regard the proposed inquiry as quixotic. It is hard to perceive just how a federal district court might reasonably determine whether, for example, "professional opportunities would likely be any different for two women with identical college and graduate school records at the same university and identical

7. Central's selective admission criteria have been utilized for generations to identify its students as potential leaders "in industry and in life." See Petitioners' Brief p. 15 fn 8. Female students who meet these qualifications except as to sex, like the Plaintiffs in *Sweat* and *McLaurin*, are potential leaders and members of an emerging group who can not fulfill their potential in isolation.

8. Respondent's contention that *Sweat* and *McLaurin* are applicable only to race discrimination is without merit. See Memorandum of United States as *amicus curiae* pp. 26-28.

high school records, if one were a graduate of Girls and the other a graduate of Central." *Ibid.* The proposition that graduation from a uniquely prestigious institution tends to carry with it a special momentum for success would seem to be one of those issues on which a page of history would be worth a volume of remand. In any event, this Court did not find it necessary in *Sweat v. Painter, supra* to remand for findings on whether a black graduate of (the Jim Crow) Texas State University Law School would in fact be professionally disadvantaged as against a black graduate of the University of Texas Law School.

On an analytical level, the recommendation of the Solicitor General is also disturbing, since it suggests that the protection of the Fourteenth Amendment is limited to economic deprivations. On the contrary, this Court's decisions in both *Sweat* and *McLaurin* make it clear that education, even apart from its economic rewards, is a significant interest within the purview of the Equal Protection Clause. Indeed, it seems particularly unlikely that this Court, only a few months after holding that the opportunity to drink 3.2 beer could not be limited on the basis of gender, would afford less protection to educational opportunity.

D. The Single Sex Character of Central High School Is Not Substantially Related to Any Important Objective of the School District.

Craig v. Boren, supra, teaches that a sex-based classification can not be sustained by overbroad generalizations, even where there is a significant correlation between gender and the characteristic which it is purported to represent. Where statistical studies are employed, their conclusions must be decisively and unimpeachably supported by the research, and the relevance of the subject of the study to the purpose of the classification must be manifest. In addition, data which is merely descriptive of

the effects of present or past discrimination may not be utilized to justify policies which promote or reinforce "old notions" of sex appropriate behavior.

At trial, the Respondents attempted to demonstrate that sex segregation is educationally beneficial for high school students. Their proof falls into two categories: its effect upon females and upon males. Their effort to establish that single sex education is beneficial for girls fails to address the overbreadth of the classification challenged here. None of the authorities relied upon even suggest that all female high school students share the characteristics which, arguably, make the coeducational setting less conducive to academic progress. Consequently, this rationale may not be invoked to exclude those females who would benefit from the opportunity to attend Central High School.

The Respondents also failed to demonstrate that the male students at Central would be injured by the introduction of females into Central's student body. The Jones-Shallcross-Dennis study (D-1) introduced by the testimony of Dr. Jones, identified only minimal attitudinal differences between the male students at the New Zealand single-sex and co-educational high schools which were the subject of the study. The trial court found that this study failed to justify the exclusion of female students from Central High because (1) its findings did not appear to be applicable to a high school for superior students, and (2) it did not demonstrate that the gender composition of a school resulted in higher educational achievement (Pet. 56a). In fact, studies which measured academic achievement directly have found that boys make better progress, particularly in mathematics, in co-educational schools. See III Dale *Mixed or Single Sex Schools?* 266.

In their Brief in this Court, the Respondents abjure any claim that sexually segregated education is superior

to co-education (at p. 29).[9] They limit their endorsement of single-sex education to the assertion that it is a "reasonable" educational methodology, which they base primarily upon the stipulation that it has a "long history and world wide acceptance" and is regarded by some educators as a "reasonable and natural approach". (Findings 32 & 33).[10] The long history and wide acceptance of single-sex education, considered in the context of the "long and unfortunate history of sex discrimination" which this Court has acknowledged (see *Frontiero v. Richardson,* 411 U. S. 677 at 680 (1973)), tends to cast even greater doubt upon its legitimacy. As Justice Stevens has pointed out:

> [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . . . But that type of stereotyped reaction may have no rational relationship—other than purely prejudicial discrimination—to the stated purpose for which the classification is being made. (*Matthews v. Lucas,* 96 S. Ct. 2755 at 2769, Stevens, J, dissenting).

Moreover, while Petitioners acknowledge that some educators favor single-sex education, the existence of this body of opinion does not establish that sex-segregation is in any way related to the achievement of the School District's stated objectives. The Respondents objectives do not include socializing students to conform to sex-appropriate patterns of behavior, which appears to be a major

9. Such a contention would put the School District in an anomalous position, in view of the co-educational nature of most of its high schools.

10. Petitioners did not stipulate that single sex education is "reasonable", as Respondents suggest at p. 29-30 of their Brief.

concern of the advocates of single sex education (See Brief of Petitioners p. 35-36 and fn. 34).

The Respondents argue that they are entitled to continue to maintain Central as an all-male institution in the interest of providing an alternative for the students and parents who prefer single-sex education. In assessing this asserted justification, it is not necessary to determine whether a single sex alternative may ever be permissible in an otherwise sexually integrated school system. In this case it is clear that fostering "freedom of choice" is not the real purpose for excluding female students from Central High School and consequently will not sustain this practice. See *Weinberger v. Weisenfeld,* 420 U. S. 636 (1975).[11]

As the district court observed, single sex education is the only choice available at the academic high school level (Pet. 85a). The record in this case also contradicts the School District's assertion that there is a demand for this form of education. On the contrary, the data introduced at the trial regarding school population statistics shows that the only high schools in the Philadelphia public school system which were not overcrowded were five of the six high schools which were single sex during the 1973-74 school year. See Exhibit A of this Brief. Two of these schools, William Penn (previously all-female) and Benjamin Franklin (previously all-male), were converted into co-educational high schools while this suit was pending. If Central were to accept female students, those male students who prefer an all-male learning environment could attend Thomas Edison, which is presently under capacity in enrollment. Edison enjoys the additional advantage of being a comprehensive high school. Consequently, it does

11. The original purpose of excluding females from Central when no other public high school existed, clearly arose from a bias against women's intellectual ability and need for formal education.

not limit the availability of single sex education to students who exhibit a characteristic (high academic performance) which has not been shown to be related to their need or preference for this type of school.

Finally, the Respondents contend that this Court must defer to the school board's determination in all matters effecting educational policy. Their reliance upon *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1 (1973), in support of this proposition is misplaced. In that case this Court merely recognized that the opportunity for local input in decisions regarding education represents a reasonable basis for drawing school district lines on a local basis. The opinion does not suggest that the decisions of a local school board are exempt from review where constitutional rights are at stake. *Epperson v. Arkansas*, 393 U. S. 97 (1968), also cited by Respondents, actually represents the contrary result.

The decision of a local school board, while it may be entitled to some respect, does not rise to the stature of a state statute, *cf. McGowan v. Maryland*, 366 U. S. 420 (1961).[12] In this particular case, it is doubtful that the school board's decision to oppose the admission of female students to Central High School even represents a valid expression of public opinion on the subject. In view of the low demand for sex segregated education reflected in the underenrollment at the single-sex schools (see p. 11 *supra*) and the influence of the Central High School Alumni Society, as found by the district court (Finding 21), it would appear more likely that the board's decision is only one more indication of the political clout of Central's alumni.[13]

12. Both *Rodriguez* and *Epperson* involved state statutes.

13. The Central High School Alumni Society appeared as *amicus curiae* on behalf of the School Board in the district court.

E. This Court Need Not Reach the Statutory Argument in This Case.

Petitioners defer to the United States in its interpretation of the provisions of the Equal Educational Opportunities Act of 1974. In its Memorandum as *amicus curiae* (pp. 12-21), the United States argues that the provisions of that Act are applicable to the present case, but that "the Act should not be construed, at least in the present context of special system-wide schools . . . as intended to prohibit sex segregation that does not independently constitute a denial of equal protection of the laws . . . wtihin the meaning of Section 1 of the Fourteenth Amendment." (id. at p. 18).

Petitioners believe that it may be inappropriate for this Court to rule upon the statutory argument in the present case. The argument of the United States is not without its difficulties. Cf. Gibbons, J., dissenting below (Pet. 27a-31a). Moreover, its construction of the Act does not avoid the constitutional issue.

The only construction of the Equal Educational Opportunities Act of 1974 which would avoid the constitutional question, is one which would find in the statute an absolute prohibition of sex based admission standards in public schools. This result is far broader than the relief requested by Petitioners.

The Court is not presented here with a difficult question of constitutional law which can be avoided by statutory construction. Rather, this is a case which calls only for the application of now settled principals of constitutional law. The statutory argument is both more difficult and broader in its impact. Consequently, the rule of decision which generally calls for disposing of the statutory claim before reaching the constitutional question is not applicable.

III. CONCLUSION.

Petitioners contend that so long as the School District of Philadelphia maintains a school which not only in name but in historical and present fact is the Central High School, petitioners are constitutionally entitled not to be barred from the benefits of that public institution because they are female. The judgment below should be reversed.

Respectfully submitted,

SHARON K. WALLIS,
Attorney for Petitioner.

Exhibit A

	Page in P-12	Capacity	Enrollment	Pupil Enrollment: % Average Attendance	% Black	% Sp. S.	% Low Income	Staff: % Black	Rate of Absence	Reading: Percent Pupils Scoring: Below 16th %ile	16th thru 49th %ile	50th thru 84th %ile	85th and above %ile
BARTRAM	3	3165	4300	75	77		37	23	6.9	45	39	14	2
WEST PHILADELPHIA	3	2789	2894	69	99+		38	41	7.8	57	33	9	1
UNIVERSITY CITY	3	2931	2958	75	99		49	37	8.3	52	35	11	2
FRANKLIN °	6	1961	1490	61	96		65	35	6.5	78	17	4	1
PARKWAY	6		867	82	69		28	49	5.5	26	42	22	10
PENN, WILLIAM °°	6	3500	2491	60	95		70	44	8.8	66	27	7	0
SOUTH PHILADELPHIA	9	2450	4043	6[illegible]	53		40	9	9.8	50	35	13	2
GRATZ	12	3077	3106	71	99+		52	46	8.7	72	23	5	0
OVERBROOK	12	2883	3415	78	99+		32	22	6.6	45	36	17	2
EDISON °	15	2010	1707	62	64	27	60	29	7.7	73	20	6	1
KENSINGTON °°	15	1019	1610	62	56	25	62	15	7.7	70	25	4	1
CENTRAL °	18	2085	1570	92	32		7	10	5.6	0	7	42	51
GERMANTOWN	18	3041	3216	71	99		33	31	7.3	50	37	12	
GIRLS °°	18	1849	1595	92	49		10	11	10.0	0	7	50	43
KING	18	2822	3164	75	98		36	37	6.7	47	41	11	1
ROXBOROUGH	18	2022	2253	80	21		20	8	7.7	23	43	27	7
FRANKFORD	21	2184	2827	78	10		13	11	4.7	26	41	27	6
OLNEY	21	3507	4509	72	61	7	25	10	6.9	46	40	13	1
LINCOLN	24	2734	3889	88	3		7	12	6.8	13	43	34	10
NORTHEAST	24	2738	3548	86	6		3	10	7.9	8	31	41	20
WASHINGTON	24	3941	4292	86	2		5	9	7.2	13	35	36	16

° All-Male School °° All-Female School

Source—Exhibit P-12, Oakes, *Statistical Analysis (School by School) of the Philadelphia Public Schools*, April, 1975.

Supreme Court, U. S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

No. 76-37

In the Supreme Court of the United States

OCTOBER TERM, 1976

SUSAN LYNN VORCHHEIMER, PETITIONER

v.

SCHOOL DISTRICT OF PHILADELPHIA AND
MATTHEW W. COSTANZO

---

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the exclusion of females from an all-male public high school with facilities, reputation, and prestige that are better in some respects than those offered by the comparable all-female school violates the Equal Educational Opportunities Act of 1974 and the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

Congress has declared, as the policy of the United States, that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." Section 202(a)(1), 20 U.S.C. (Supp. V) 1701(a)(1) (the Equal Educational Opportunities Act of 1974, 88 Stat. 514). Congress found that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment." Section 203(a)(1), 20 U.S.C. (Supp. V) 1702(a)(1).

The Equal Educational Opportunities Act, Section 204(c), 20 U.S.C. (Supp. V) 1703(c), provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by," *inter alia*,

> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student.

The Act also states (Section 206, 20 U.S.C. (Supp. V) 1705) that:

> Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin * * *.

The Act provides for civil suits in federal court by individuals denied equal educational opportunity as defined in the Act (Section 207, 20 U.S.C. (Supp. V) 1706), for suits by the Attorney General on behalf of such individuals (*ibid.*), and for intervention by the Attorney General in suits instituted by individuals (Section 210, 20 U.S.C. (Supp. V) 1709). Thus, the United States has an interest in cases involving the right to equal educational opportunity afforded by the Act.

In addition, Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. V) 1681 *et seq.*, prohibits discrimination on account of sex in programs and activities conducted by public high schools receiving federal assistance. On July 21, 1975, Title IX regulations went into effect providing, *inter alia*, that a local educational agency receiving federal assistance may not, on the basis of sex, exclude any person from admission to:

> (b) Any other school or educational unit operated by such recipient [other than vocational schools], unless such recipient otherwise makes available to such person, pursuant to the same

policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

45 C.F.R. 86.35 (see 40 Fed. Reg. 24141). Thus, to the extent that local school districts that receive federal assistance operate single-sex schools that are not comparable with regard to each course, service and facility, Title IX regulations are applicable.[1]

STATEMENT

1. On March 29, 1974, Susan Lynn Vorchheimer, by her parents, filed a class action in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. 1983 for declaratory and injunctive relief against the School District of Philadelphia (App. 5a-12a). Plaintiff alleged that the school district had deprived her of equal protection of the laws in violation of the Fourteenth Amendment by denying her admission to Central High School of Philadelphia on account of her sex.[2] Trial was held on May 28-30, 1975, and on August 7, 1975, the district court entered findings of fact and conclusions of law and an order enjoining defendants

[1] Title IX does not cover single-sex admission practices of public high schools *per se*. See 20 U.S.C. (Supp. V) 1681 (a) (1).

[2] Plaintiff also alleged violation of the Equal Rights Amendment of the Pennsylvania Constitution, Article 1, Section 28. However, the court declined to exercise pendent jurisdiction over this claim, since the state courts had not yet clearly defined the applicability of that amendment to the field of education (Pet. App. 55a).

from refusing to admit plaintiff or other members of her class to Central High School solely on the basis of sex (Pet. App. 38a-86a). On March 16, 1976, the court of appeals reversed (Pet. App. 1a-33a).

The School District of Philadelphia operates 22 senior high schools, two of which—Central High School ("Central") and the Philadelphia High School for Girls ("Girls")—are categorized as "academic" high schools. For admission to these schools specific standards must be met (Pet. App. 3a).[3] The only difference in admission criteria between the two academic high schools is that Central accepts only male students and Girls accepts only female students (Pet. App. 3a). The Philadelphia School system does not have a coeducational "academic" high school (Pet. App. 3a).

Central and Girls are the only schools in Philadelphia that draw their student bodies from the entire city. Students who attend "comprehensive" high schools (*i.e.*, schools offering industrial and commercial, as well as college preparatory, courses) generally attend the comprehensive school located in their own neighborhoods. At the time of trial, two of the comprehensive schools were all-male and one was all-female (Pet. App. 45a-46a).

In 1974 petitioner applied for admission to Central. The parties stipulated, and the district court

[3] At the time the suit was brought, students were required to score no lower than the 82d percentile in a national achievement test and present a superior junior high school record (Pet. App. 39a).

found (Pet. App. 55a), that had petitioner been a boy, she would have qualified for admission to Central.[4] Her application was rejected, however, solely because of her sex (Pet. App. 41a-42a).

2. The district court did not find a pervasive difference in the facilities and courses offered by the two schools. The court made general findings that the academic facilities at Central and Girls High are comparable, and that the courses offered at Girls are similar, and of equal quality, to those offered at Central (Pet. App. 45a). The court did find, however, that the scientific facilities at Central High School are superior to those at Girls.

In addition, the district court made extensive findings regarding the reputation and accomplishments of each school. The court found that from its founding "Central has consistently maintained a reputation for academic excellence" (Pet. App. 42a) and that (Pet. App. 42a):

> During the nineteenth century members of [Central's] faculty were nationally known physicists and English stylists. Its graduates have risen to the top of the business world, the professions, politics, and academia.

The court also found that (Pet. App. 43a):

[4] Upon graduation from junior high school, petitioner received the school's awards in English, history, science, and geometry, the American Legion Award for citizenship and scholarship and the most outstanding student award (Pet. App. 41a).

> Many men who are currently prominent in the professional, political, and cultural life of the city and state are graduates of Central. Central has a deserved reputation for training men who will become local and national leaders in all fields of endeavor.

The court further noted that Central's academic standing and reputation as "a training ground for community leaders" had attracted the attention of national figures including Presidents (Pet. App. 43a-44a). Moreover, Central High School has an active and loyal alumni association which, the court found, "is an influential group in Philadelphia, both because of its activities as a group and the individual positions held by its members" (Pet. App. 44a). Central is the only high school in Philadelphia with a substantial private endowment (Pet. App. 45a).

The district court found that Girls High has had a large number of prominent graduates in the field of business and the professions, including three local judges and the first vice-president of the American Medical Association (Pet. App. 44a). The court also found, however, that the number of Girls High graduates who have become influential in the community did not approach the number of influential graduates of Central (Pet. App. 44a).

The district court held that the policy of denying all females admission to Central High deprived them

of equal protection of the laws.[5] Finding that the policy "has an adverse impact on [petitioner] and on other women" (Pet. App. 83a), the court concluded that the evidence did not demonstrate that the classification bore " 'a fair and substantial relationship' to the School Board's legitimate interests" (Pet. App. 84a). Rejecting the argument that exclusion of male students from Girls High neutralized the discrimination, the court stated: "[T]his argument overlooks [petitioner's] expressed desire to attend Central, a desire which, in light of Central's history and reputation, does not seem frivolous or eccentric" (Pet. App. 82a-83a). The court also noted that "the existence of Girls does not satisfy [petitioner's], or any other girl's, desire to attend a coed academic school" (Pet. App. 83a).[6]

3. A divided panel of the court of appeals reversed. Viewing the issue in this case as whether single-sex schools are *per se* impermissible under the Constitution and the Equal Educational Opportunities Act of 1974,[7] the court of appeals concluded that they are not.

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[5] The statutory issues in this case were not raised or considered in the district court. They were first discussed at the request of the court of appeals.

[6] The court noted that "[t]he result of defendants' policy of excluding young women from Central is to deny them the opportunity to attend a coeducational, academically superior, public high school" (Pet. App. 83a).

[7] The court defined the question as follows (Pet. App. 2a):

> Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational? Stated another way, do our Constitution and laws forbid the maintenance by a public school board, in a system otherwise coeducational, of a limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal?

At the outset, the court of appeals attempted to set forth "[a] fair summary of the parties' positions" (Pet. App. 5a) including, among other things, that "the schools for boys and girls are comparable in quality, academic standing, and prestige * * *" (*ibid.*) and that "the deprivation asserted is that of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige" (*ibid.*). The court also stated that "[petitioner] prefers to go to the boys' school because of its academic reputation and her personal reaction to Central. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury" (*ibid.*).

Addressing the statutory question, the court of appeals held that the Equal Educational Opportunities Act of 1974 did not require dismantling of all schools segregated on the basis of sex. The court noted that the Act specifically referred to sex as an impermissible basis for classification in certain provisions but omitted it in other provisions, and stated: "Insofar, then, that the Equal Educational Opportunities Act of 1974 might have application to established single-sex schools, the legislation is at best ambiguous"

(Pet. App. 9a). Turning to the legislative history of the Act, the court found "no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives" (Pet. App. 11a).

The court specifically found Section 204(c), 20 U.S.C. (Supp. V) 1703(c)—which prohibits "the assignment * * * of a student to a school, other than the one closest to his or her place of residence * * *, if the assignment results in a greater degree of segregation of students on the basis of * * * sex * * *"—to be inapplicable to this case.[8] In the court's view, that section was concerned with the preservation of neighborhood schools and demonstrated a policy "against assignment of students to non-neighborhood schools to achieve segregation on any of the forbidden bases" (Pet. App. 10a). The court concluded, without explanation, that "[w]e do not here face an attempt by a school board" to make such a prohibited assignment (Pet. App. 10a).

The court also found no constitutional grounds for dismantling the single-sex schools. Stating that petitioner had not alleged "a deprivation of an education equal to that which the school board makes available to boys" (Pet. App. 12a) or the operation of a quota system or differential admission standards, the court observed that "[i]f there are benefits or detri-

[8] The court also reviewed other provisions of the Act (not including Section 206) and concluded that they were inapplicable to this case (Pet. App. 10a).

ments inherent in the system, they fall on both sexes in equal measure" (Pet. App. 13a). The court held that *Sweatt* v. *Painter*, 339 U.S. 629, and *Brown* v. *Board of Education*, 347 U.S. 483, are inapplicable to this case because "[r]ace is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender" (Pet. App 13a). Instead, the court gave great weight to this Court's summary affirmance of *Williams* v. *McNair*, 316 F. Supp. 134 (D. S.C.), affirmed, 401 U.S. 951, in which a three-judge court upheld against constitutional attack South Carolina's exclusion of men from one of its several state colleges. The court concluded that, whether the sex classification involved here is measured by the rational basis test or the "fair and substantial relationship" test applied by the district court, the exclusion of female students from Central High School is constitutionally permissible.

In dissent, Judge Gibbons argued that the Equal Educational Opportunities Act of 1974 prohibited sex segregated public schools such as Central (Pet. App. 19a-26a). He also urged that such schools are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

DISCUSSION

I. THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 PROHIBITS THE ASSIGNMENT OF A STUDENT TO A SUBSTANTIALLY LESS ADVANTAGEOUS SCHOOL SOLELY ON THE BASIS OF SEX

The Equal Educational Opportunities Act of 1974 on its face addresses the problem of sex discrimination in education at several points. Section 202(a)(1) of the Act, 20 U.S.C. (Supp. V) 1701(a)(1), declares, as the policy of the United States, that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, *sex*, or national origin * * *" (emphasis added). Section 203(a)(1), 20 U.S.C. (Supp. V) 1702(a)(1), states: "The Congress finds that * * * the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, *sex*, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment" (emphasis added). It is thus clear from these preliminary provisions that Congress was specifically concerned with denials of equal educational opportunity and found that, at least in some circumstances, assignment of students to schools solely on the basis of sex would be a denial of equal protection of the laws.

Certain practices involving assignment of students by reason of sex are declared unlawful in Sections

204 and 206 (20 U.S.C. (Supp. V) 1703, 1705). Section 204, 20 U.S.C. (Supp. V) 1703, provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, *sex*, or national origin, by—
>
> * * * * *
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, *sex*, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student * * *. [Emphasis added.]

This provision by its terms applies only to the assignment of a student to a school other than the school nearest to his or her home, where the result of the assignment is greater segregation constituting a denial of equal educational opportunity.

Section 206, 20 U.S.C. (Supp. V) 1705, states in relevant part:

> Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is

> not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, *sex*, or national origin * * *. [Emphasis added.]

In contrast to Section 204(c), this section concerns only assignments to the nearest school and does not make such assignments unlawful unless the purpose of the assignment is to segregate students on an impermissible basis.

Read together, Sections 204(c) and 206 primarily evidence a congressional intent to encourage the assignment of students to neighborhood schools except in certain specified circumstances. Since Congress had declared in Section 202, as the policy of the United States, not only that equal educational opportunity should be afforded without regard to race, color, sex, or national origin, but also that "the neighborhood is the appropriate basis for determining public school assignments" (Section 202(a)(2), 20 U.S.C. (Supp. V) 1701(a)(2)), Congress logically would wish to prohibit assignments of students to more distant schools that resulted in greater segregation. But to reconcile the occasionally competing policies set forth in Section 202, Congress also provided that assignments to the nearest school, while generally permissible, are not lawful where the purpose of the assignment is to increase segregation. In short, Congress made clear that a neighborhood school policy, while normally to be favored, could not serve as a justification for deliberate segregation.

The schools involved are not neighborhood schools, and the record does not disclose whether Central High School is nearer to petitioner's home than Girls High, the academic school to which petitioner was effectively assigned by her rejection at Central High, or vice versa. Petitioner is therefore entitled to seek relief under either Section 204(c) or Section 206, but not both. If she, and the class members she represents, are required to attend the *farther* academic school solely because they are female, the case invokes Section 204(c), since such assignments "[result] in a greater degree of segregation of students on the basis of * * * sex" than would result from random assignment to the nearest academic school. On the other hand, if petitioner, and the class members, are being assigned to the *nearest* academic school, Section 206 is invoked since the record leaves no doubt that the assignments are for the purpose of keeping the academic high schools segregated by reason of sex. Respondents have made no pretense that petitioner was denied admission to Central High because it was not the nearest academic school.

The fact that petitioner's decision to attend an academic high school, and Central High in particular, is voluntary does not make the provisions of the Act inapplicable.[9] Both Section 204(c) and Section

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[9] Petitioner admittedly was qualified to attend an academic high school. Because her application to Central High was rejected solely on the basis of sex, her only opportunity to attend an academic high school was to attend Girls High.

206 speak in terms of assignments to schools providing "the appropriate grade level and type of education for such student."

Moreover, there is no indication that Congress wished school districts to provide equal educational opportunity only for students in standard schools, while assigning more qualified students or students requiring special attention to less advantageous schools on the basis of sex or race. It is more reasonable to suppose that Congress, committed to the principle of equal educational opportunity, wished it to prevail at all levels of an educational system. It is not clear, however, that Congress intended the particular mechanisms of Sections 204(c) and 206 invariably to apply to such assignments (not in-

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Once petitioner chose to attend an academic high school and was deemed qualified, therefore, she was effectively assigned to Girls High as the only alternative to attending her neighborhood comprehensive high school.

In any event, the term "assignment" has commonly been used to mean placement in a particular school, regardless of whether or not the student attended the school voluntarily. See Section 401(b) of Title IV of the Civil Rights Act of 1964, 78 Stat. 246, as amended, 42 U.S.C. (Supp. V) 2000c(b); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 433 (free choice plans); The Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964 (H.E.W. publication (1968)) (free choice plans). Were the term construed to include only involuntary assignments, the Act would not be applicable to freedom of choice plans that resulted in greater segregation than would result in a system of neighborhood schools, a result that Congress hardly can have intended.

volving neighborhood schools),[10] for the statute would then arguably [11] preclude any possibility of sex-segregated special schools, even in circumstances where there is no denial of equal educational opportunity. Unless the Court were to hold that sex segregation in public education is, like racial segregation, inherently unequal and hence unconstitutional (see point II, *infra*, pp. 21-29), such a construction of the Act would raise a serious constitutional question concerning the extension to this context of the principle of congressional authority under Section 5 of the Fourteenth Amendment adopted by this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641, in a context involving a significant nexus with governmentally furnished (or approved) education in the Spanish language in Puerto Rico. Cf. *Oregon* v. *Mitchell*, 400 U.S. 112.

In light of the seriousness of that constitutional question and the fact that the focus of congressional

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[10] Although there is no explicit reference to neighborhood schools in the operative provisions of Sections 204(c) and 206, the heading of the latter section is "Assignment on Neighborhood Basis not a Denial of Equal Educational Opportunity" (88 Stat. 515, 20 U.S.C. (Supp. V) 1705).

[11] Another possibility for a narrowing construction of these two provisions (which would apply as well to standard, neighborhood schools) would be to read the introductory language of Section 204, that "[n]o State shall deny equal educational opportunity" as limiting the circumstances in which the prohibitions of Section 204(c) and (through Section 206's cross reference "to the other provisions of this subchapter") Section 206 apply.

concern in the 1974 Act was on remedies for constitutional violations, rather than on extension of the constitutional prohibitions, we have concluded that the Act should not be construed, at least in the present context of special system-wide schools (see n. 10, *supra*), as intended to prohibit sex segregation that does not independently constitute a denial of equal protection of the laws (through denial of equal educational opportunity) within the meaning of Section 1 of the Fourteenth Amendment.

As the court of appeals noted (Pet. App. 6a-9a), Congress considered the issue of single-sex public schools in 1972 and declined to prohibit them. Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. V) 1681 *et seq.*[12] The bill that became Title IX, as passed by the House, would have required all single-sex schools to become coeducational; the Senate bill, which was enacted, was amended to exempt the admissions policies of certain institutions (including single-sex public high schools) on the ground that information regarding those institutions was incomplete. 118 Cong. Rec. 5807 (1972) (remarks of Senator Bayh). Two years later, Congress changed its course and prohibited, at least in some circumstances, the segregation of students by sex.[13] The legislative

[12] Title IX generally forbids discrimination in education on account of sex. The admission practices of public schools segregated by sex *per se*, however, are expressly excluded from its coverage (20 U.S.C. (Supp. V) 1681(a)(1)).

[13] These provisions of the 1974 Act are virtually identical to provisions contained in the Equal Educational Opportunities Act of 1972, which was passed by the House, but defeated in the Senate (H.R. 13915, 92d Cong., 2d Sess. (1972)). The court below found that "significantly," the term "sex" was deleted from certain provisions of the 1972 bill before it was passed on the floor of the House (Pet. App. 9a). However, as the dissent below pointed out (Pet. App. 24a-25a), there was an apparent error in the Committee Report relied upon by the majority (H.R. Rep. No. 92-1335, 92d Cong., 2d Sess. (1972)), which conflicts with the language of the bill actually reported out of committee and read by the Clerk on the floor of the House. 118 Cong. Rec. 28883 (1972).

history of the 1974 Act, however, casts no light on this decision; the House and the Senate devoted principal attention to the provisions of the Act intended to limit the use of busing as a remedy for racial segregation in the schools.

While this history does not, in our view, suggest that Congress intended to expand the constitutional standards concerning sex discrimination, the Act does indicate a congressional concern to afford a comprehensive remedy for denials of equal educational opportunity on the basis of sex. Indeed, in 1974 Congress also recognized in other ways the disadvantages faced by women in public education and was concerned with providing remedies. In Title IV of the Education Amendments of 1974, 88 Stat. 484,[14] entitled the Women's Educational Equity Act of 1974, 88 Stat. 554, 20 U.S.C. (Supp. V) 1866, Congress expressly found that "* * * educational programs in the United States * * * are frequently inequitable as such programs relate to women * * *"

[14] The Equal Educational Opportunities Act of 1974 constituted Title II of the Education Amendments of 1974.

(20 U.S.C. (Supp. V) 1866(b)(1)), provided for grants to correct educational inequities (20 U.S.C. (Supp. V) 1866(d)), and established an Advisory Council on Women's Educational Programs to advise the Commissioner of Education (20 U.S.C. (Supp. V) 1866(f)). Moreover, the Senate Committee report on the bill that became Public Law 93-380 stated (S. Rep. No. 93-763, 93d Cong., 2d Sess. 79 (1974)):

> The Committee concluded that a more vigorous and focused Federal role should be taken in eliminating the widespread sex discrimination in education; and that the Women's Educational Equity Act, by providing support for affirmative action programs, would enhance the prospects of full implementation of Title IX.

The provisions of the Equal Educational Opportunities Act of 1974 show that Congress gave discerning attention to the problem of denial of equal opportunities on the basis of sex. Although the court of appeals found it anomalous that sex was omitted from the coverage of Section 204(a), 20 U.S.C. (Supp. V) 1703(a), which prohibits "deliberate segregation * * * of students on the basis of race, color, or national origin *among or within* schools" (emphasis added), that exclusion is entirely reasonable in view of the possibility that Section 204(a) could be read to eliminate separate facilities (such as locker rooms) or classes (such as gym classes) *within* coeducational schools. Indeed, Section 204(a) must be read in conjunction with Section 221(c) of the Act, 20 U.S.C. (Supp. V) (1720(c), (not cited by the

court of appeals), which defines "segregation" as "the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or *within a school* on the basis of race, color, or national origin" (emphasis added).

Accordingly, we conclude that the 1974 Act provides a remedy in the present case if, and only if, petitioner was denied the equal protection of the laws, within the meaning of Section 1 of the Fourteenth Amendment. We turn now to a discussion of the appropriate criteria for adjudicating that question.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE ASSIGNMENT OF STUDENTS TO SEPARATE HIGH SCHOOLS ON THE BASIS OF SEX, WHERE THE SCHOOLS DO NOT AFFORD SUBSTANTIALLY EQUAL EDUCATIONAL OPPORTUNITIES

This Court has recently stated that "[t]o withstand constitutional challenge, * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, No. 75-628, decided December 20, 1976, slip op. 7. Without question the classification at issue in this case is a "classification by gender," for the school authorities stipulated, and the district court found (Pet. App. 55a), that "[p]laintiff has been denied admission to Central solely because of her sex."

On the other hand, although racially segregated "educational facilities are inherently unequal" (*Brown* v. *Board of Education*, 347 U.S. 483, 495), neither this Court nor Congress has declared that sex segregation in educational facilities is inherently unequal. Indeed, as we have shown, the Equal Educational Opportunities Act of 1974 appears to recognize the permissibility of sex segregation in some educational programs within a school. And this Court's summary affirmance in *Williams* v. *McNair*, *supra*, apparently upheld a state's adoption of particular, or various, theories of educational philosophy as a justification for denial of admission to a particular institution on the basis of sex, so long as substantially equal educational opportunities were afforded. The findings and record before the Court in the present case do not provide an adequate basis for a determination that that standard of constitutional flexibility, permitting non-invidious experimentation in methods of achieving educational objectives, is no longer appropriate. Compare *Brown* v. *Board of Education*, 345 U.S. 972, decided, 347 U.S. 483. Accordingly, we believe the pertinent constitutional inquiry here is whether petitioner, and the class she represents, have been afforded educational opportunities substantially equal to those available for students admitted to Central High School, and we turn now to that question.

Although the district court found that "the education available to the female students at Girls is comparable to that available to the male students at Central" (Pet. App. 45a), the district court also

recognized that very real differences exist between the two schools. The findings of fact, none of which was disturbed by the court of appeals, establish that Central High School has superior science facilities, a more extensive library, a more prominent body of graduates, an enhanced reputation, and a greater endowment. Insofar as physical facilities are concerned, the district court found (Pet. App. 45a), and the court of appeals recognized (Pet. App. 3a), that Central has scientific facilities superior to those found at Girls. Indeed, Central possesses the first classroom planetarium built in any high school in the country, and a student built cyclotron (App. 39a-40a). The school's libraries are also considerably different in size.[15]

Other distinctions between the two schools are more subtle and are intertwined with the historically disparate roles of the sexes in the community. The district court found that Central has a "deserved" reputation for training men who will become local and national leaders in all fields of endeavor (Pet. App. 43a). The Central Alumni Association is an influential group in Philadelphia, "both because of its

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[15] Although the two schools now have faculties and student bodies of approximately equal size (Pet. App. 3a), Central's library contains more than 50,000 volumes (App. 39a) while the library at Girls High contains only 30,000 volumes (R.M. Klein, Tr. 223). No finding indicates, however, whether these figures reflect a practical difference in educational opportunity rather than, for example, a larger proportion of obsolete volumes at Central, which is the older of the two schools.

activities as a group and the individual positions held by its members" (Pet. App. 44a). While the district court found that persons of note also had graduated from Girls, it further stated that "the number of Girls High graduates who have become influential in business, professional, or academic affairs does not approach the number who have graduated from Central * * *" (*ibid.*). The record also indicates that Girls High has an alumni association whose members contribute financially to the school; however, "Central High is the only high school in Philadelphia with a substantial private endowment" (Pet. App. 45a). Finally, as the district court found, the dedication and loyalty of Central's alumni, "whether measured by financial contributions or day-to-day participation in matters related to the school, equals the loyalty of many college alumni to their alma mater" (Pet. App. 44a). The court made no such finding with regard to Girls High.

These distinctions are closely related to a history of state-supported segregation by sex. When Central High School was founded in 1836, the Philadelphia school system unquestionably was engaging in deliberate discrimination against young women. At that time Central was the only public high school in Philadelphia (Pet. App. 42a). During at least part of the nineteenth century, therefore, female students had no opportunity to attend a public high school.[16] Although

[16] Females were allowed to attend Central for a time in the mid-nineteenth century:

> An innovation of Dr. Hart's administration was the organization of Saturday classes for women, part of whom were teachers in the lower schools and part "some of the more advanced pupils in the girls' Grammar Schools." Dr. Hart's notice is dated October 21, 1844, and marks the beginning of the first and only period during a regular school year when girls were educated within the halls of Central High.

Cornog, *School of the Republic* 17 (1952) (Plaintiff's Exhibit 7).

> This innovation in 1844 marked the beginning of public higher education of women in Philadelphia. The Saturday classes were continued until 1851, when the work was taken over by the Girls' Normal School, which had been established three years before. Thus, although Central High School was never a co-educational institution (except for the summer school sessions begun in 1922), it rendered valuable service during a period of seven years in qualifying women for their work as teachers.

Hand Book of the Central High School of Philadelphia, The Mary Gaston Barnwell Foundation 214 (1955).

Girls High School was established in 1893 as a secondary school for girls, its antecedent was a teachers' training school founded in 1848 (App. 9a, 14a).[17] Another distinction between Central and Girls, begun in the nineteenth century, and continued to the present, is that Central, unlike Girls, or any other high school in the Philadelphia public school system, confers a Bachelor of Arts Degree upon its graduates (App. 9a, 15a).[18]

[17] One of the expert witnesses for the School District of Philadelphia testified that in her opinion there were "fairly common lay attitudes" in the nineteenth century that girls schools should, among other things, prepare women students "for docile homemaking roles" (Tr. 106, testimony of M. Elizabeth Tidball).

[18] The Act of Assembly of Pennsylvania of April 2, 1849 provides that:

These differences are in some respects reminiscent of those involved in this Court's decision, more than twenty-five years ago, in *Sweatt* v. *Painter*, 339 U.S. 629. There, the Court held that a black student could not be denied admission to the University of Texas Law School, from which he had been barred because of his race, where the State had not provided a substantially equivalent alternative. Discussing the relative merits of the University of Texas Law School and the newly formed black law school at Texas State University for Negroes, this Court observed (339 U.S. at 633-634):

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

The Controllers of the Public Schools of the First School District of Pennsylvania shall have and possess power to confer academic degrees in the arts upon graduates of the Central High School, in the City of Philadelphia, and the same and like power to confer degrees, honorary, and otherwise, which is now possessed by the University of Pennsylvania.

The degree is the functional equivalent of a high school diploma (App. 15a), but it is symbolic of the special status of Central High.

The Court then rejected the suggestion that a policy of mutual exclusion somehow saved the segregated plan (339 U.S. at 634-635):

> It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

Sweatt v. *Painter* was decided prior to this Court's holding in *Brown* v. *Board of Education*, *supra*, that racial segregation in education is inherently unequal. For this and other reasons, we believe that similar considerations are pertinent in determining whether

a state has unconstitutionally denied equal educational opportunities on the basis of sex.

There are, however, important differences between the disparities in the opportunity for a professional education and subsequent professional employment found in *Sweatt* and the disparities involved here—differences which have not adequately been addressed in the findings below. We are, for example, uninformed about whether the existing disparities between the two schools in science and library facilities have any practical effect on the graduates' employment opportunities or, what is probably more pertinent, opportunities for college preparation, admissions and scholarships—or whether the constitutionality of those disparities must instead be assessed solely on the basis of differences in the opportunities for high school students to pursue their immediate intellectual interests.

Similarly, we do not know whether the differences found in the prestige of the two schools meaningfully affect employment opportunities—especially in the professions principally discussed in this record, which ordinarily require preparatory higher education. The findings below do not, for example, provide a basis for determining whether professional opportunities would likely be any different for two women with identical college and graduate school records at the same university and identical high school records, if one were a graduate of Girls and the other a graduate of Central. To the extent that any professional disadvantages for graduates of Girls High

result instead only from sex prejudice in the community, petitioner's complaint in this regard would seem to raise only an issue concerning the possibility that sex stereotypes in the community are reinforced by the city's sex segregated high schools—an issue which could be regarded as having greater political than constitutional dimension, especially in light of the fact that women are not a political minority.

We conclude, therefore, that the findings in this case do not provide an adequate basis for adjudication on the merits by this Court and suggest that the Court may wish to consider remanding the case for pertinent further findings and, if appropriate, the hearing of additional evidence on which to base those findings.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 227403 42

MOTION FILED

DEC 10 1976

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-37

SUSAN LYNN VORCHHEIMER, by her parents Bert and Carol Vorchheimer, guardians *ad litem,* on her own behalf and on behalf of all others similarly situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE N.O.W. LEGAL DEFENSE AND EDUCATION FUND

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The undersigned, as counsel for the American Jewish Committee and the N.O.W. Legal Defense and Education Fund, respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Interest of the *Amici*

The American Jewish Committee was founded in 1906 and is concerned with the preservation of the security and constitutional rights of Jews in America through preservation of the rights of all Americans. The Committee believes that the welfare of Jews in the United States is inseparably

related to the extension of equal opportunity for all, necessitating equal protection of the law for women, as well as for members of minority groups. The Committee has filed briefs in numerous cases involving equal educational opportunity for minority students, including *Brown* v. *Board of Education,* 347 U.S. 483 (1953), *Keyes* v. *School District,* 413 U.S. 189 (1973) and *Lau* v. *Nichols,* 414 U.S. 563 (1974)

The N.O.W. Legal Defense and Education Fund is a non-profit, civil rights organization, organized in 1971, which exists to eliminate discrimination and secure equal rights for all women.

Discrimination in public education which is sex-based is, in the view of the Committee, a primary wrong to the person excluded, as well as a potential threat to members of either sex. Accordingly, the *amici* are deeply concerned with the issues and outcome of this case.

We believe that this case presents important issues concerning the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In challenging the constitutionality of the action and policy of the Philadelphia School District which bars access of academically-qualified female students to Philadelphia's most renowned and scholastically distinguished secondary school, this case raises issues concerning the applicablity of the Equal Protection Clause to members of the female sex.

The accompanying *amici curiae* brief, based upon our growing concern and experience in matters involving sex-based discrimination, is offered in the hope that it will make

a modest contribution to the resolution of the issues before this Court.

We have sought the consent of the parties to the filing of a brief *amici curiae.* Counsel for the petitioners granted consent. Counsel for the respondents withheld consent. Therefore, pursuant to Rule 42 of the Revised Rules of this Court, we move for leave to file our brief *amici curiae,* which is conditionally attached hereto.

We regret the short delay in the submission of this brief, occasioned solely by the necessity of the process involved in procuring the approval of our governing bodies.

December, 1976

Respectfully submitted,

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.2d 880; the order denying rehearing *en banc* is not yet reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Statement of the Case

Petitioner, secondary school student Susan Vorchheimer, commenced this class action to enjoin the Philadelphia School District from denying academically-qualified female students the equal protection of the laws by barring their access to Central High School, Philadelphia's most renowned scholastically-oriented secondary school.

At both the junior and senior high school levels, Philadelphia maintains "academic" schools for scholastically superior students. Susan Vorchheimer attended Masterson School, a coeducational academic junior high school. Upon graduation in June, 1974, she was designated most outstanding student and received several other awards, including the awards in science and geometry. Despite her conceded academic qualification, her application for admission to Central High School was rejected. She was denied admission to Central solely on the basis of her sex.

Philadelphia maintains only two academic senior high schools: Central, a school reserved for males, and Girls High, which is reserved for females. No other high school in Philadelphia offers the range of courses available at Central or Girls, nor does any other senior high school select its student body solely on the basis of academic testing and achievement. Central and Girls draw students from

the entire city; all other schools operate mainly on a neighborhood basis. Most Philadelphia high schools are substantially overcrowded; enrollment at Central and Girls is under capacity.

It is undisputed that Central's scientific facilities are superior to those of Girls High.

Throughout Central's history, the school's academic standing and reputation as a training ground for community leaders has attracted the interest of national figures. The loyalty of Central's alumni, measured by financial contributions and participation in school affairs, equals the loyalty of many college alumni to their alma maters. Central is the only high school in Philadelphia with a substantial private endowment.

Based on these findings, the district court held that Central's exclusionary policy adversely affects Susan Vorchheimer and the class she represents by denying them the opportunity to attend a coeducational, academically superior public high school, a school with an unequaled history and national reputation. Concluding that the arrangement denied females the equal protection of the laws, the court enjoined the Philadelphia School District "from refusing to admit [Susan Vorchheimer] or any other member of the class she represents to Central High School solely on the basis of her sex."

Responding to a question broader than the one raised by Susan Vorchheimer ("Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"),

the Court of Appeals for the Third Circuit reversed the court below in a 2-1 decision. The majority acknowledged that "[e]qual educational opportunities should be available to both sexes in any intellectual field." Further, it noted that "in the scientific field * * * Central's [academic facilities] are superior." Nevertheless, the majority held that Susan Vorchheimer and those she represents are not denied the equal protection of the laws by their exclusion from Central High School.

On October 18, 1976, this Court granted the petition for *certiorari*.

Question to Which This Brief Is Addressed

Does the action of the Philadelphia School District deny academically-qualified female students the equal protection of the laws by barring their access to Philadelphia's most renowned scholastically-oriented secondary school solely on the basis of sex, without providing a coeducational secondary school which is truly equal to that school?

ARGUMENT

I

Outstanding academic students in the Philadelphia School District should be furnished the option of attending a coeducational, academic public high school.

A. The failure of respondent school district to furnish outstanding academic students with the option to attend a coeducational public high school, while average students are furnished with this option, constitutes a denial of Equal Protection guaranteed by the Fourteenth Amendment.

Respondent school district offers academic, comprehensive, technical and "magnet" types of high schools. Among the comprehensive high schools, which are aimed at the average student, "most * * * are co-ed." 532 F.2d 880, at 881. That is, average high school students in the Philadelphia School District are furnished the option of attending schools geared to their needs which are coeducational, as well as those few which are restricted on the basis of gender.

As regards the district's two academic high schools, however, the situation differs markedly. These schools, which offer the only college preparatory courses and are attended solely by outstanding students, restrict their admission on the basis of sex: Central High School is restricted to males, and Girls High School to females. For the outstanding public high school student in Philadelphia there is no choice but to attend a single-sex school.

The court below [at 882] states that "[t]he local school district has chosen to make available on a voluntary basis

the time-honored educational alternative of sexually-segregated schools." This statement at once implies (1) that the norm of high school education is coeducation, and (2) that all high school students in the district are provided with the alternative to attend either coeducational or single-sex schools. As to the first point above, we agree that coeducation is the norm, and document this in point B, *infra.*

With reference to the second point, it is an undisputed fact that outstanding academic students cannot choose to attend a coeducational public high school, which is limited to outstanding students, since attendance at the academic high schools is restricted on the basis of sex. It is inaccurate to term the availability of these two high schools an "educational alternative." Quite the contrary: since there is no coeducational school available within the district for outsanding academic students, the two high schools in this case offer no "educational alternative" at all for such students. They must attend either Girls or Central, depending entirely on their sex. "Since a female (or male) student who wishes to attend an academic high school can only attend a single-sex institution, defendant does not provide alternatives at this level." 400 F.Supp. 326, at 333.

The essence of "equal protection" is that persons similarly situated must be treated similarly by the state. In the present case, college-bound youngsters seeking to attend coeducational public high schools in the Philadelphia School District can only do so if they attend a "comprehensive" school which is mainly for average students and which does not offer the curricular opportunities available in the two best schools.

B. Coeducation is the norm rather than the exception in modern schooling, considering the educational benefits derived from coeducation as opposed to single-sex schooling.

"More girls are sharing classrooms with boys, at all levels, in a growing number of coeducational schools all around the world." Greenough, *Coeducation As A World Trend,* 98 School and Society 2322, Jan. 1970, at p. 31. The "trend" to coeducation, so termed in the above article, has now become so much the norm that the court below [at 882] referred to single-sex schools as an "educational *alternative.*" [Emphasis added.] "Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity." *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975). Notably, with the exceptions of Central and Girls, and three comprehensive high schools, the school system is otherwise coeducational.

The phenomenon of coeducation has been accepted in American schooling with a "swiftness and intensity," to the extent that the switch-over from exclusively single-sex school systems to those with coeducation at their core has proceeded with a degree of "urgency." As stated in Radlo, *Boys and Girls Together* (?), 29 The Independent School Bulletin 2, Dec. 1969, at p. 12.

> "[I]t becomes apparent after observing these changes [from single-sex to coeducational schools] that those schools that have made the decision to accept the other sex on a totally equal basis are those that are achieving the greatest success. If in the classroom, in sports, in activities, in student government full parity is established, then a healthy climate is established." Lloyd, *An Apple For Coeducation,* 32 Loc, cit. 1, October 1972, p. 38.

This brief does not argue that single-sex schools be abolished, merely that where the school district has recognized coeducation as the norm and has seen fit to provide average students with the option of attending either coed or single-sex schools, the same option must be granted to the district's outstanding students.

II

Respondent school district's two single-sex, public academic high schools are in fact not equal in the areas of scientific facilities and monetary endowment.

The court below stated [at 885] that "[t]he finding of the district court discloses no inequality in opportunity for education between Central and Girls High Schools." This is a clear misstatement of fact, since the precise finding of the district court was: "With the exception of scientific facilities, in which Central is superior, the academic facilities of Central and Girls High are comparable." 400 F. Supp. 326, Finding of Fact No. 25, at 329 (1975).

The fact that Girls and Central are the only two academic high schools in the district may account for their being termed "comparable." Nevertheless, they do differ in quality of science facilities, and the petitioner member of the certified class of women complainants was the recipient of her junior high school's science award at the time she applied for admission to Central High School. Findings of Fact, Nos. 14 and 15, 400 F.Supp. at 328.

Ms. Vorchheimer, presently in her first year of college, has no plans at present to enter the scientific field. This

is not of crucial importance, however, since this suit is being brought on behalf of the class of all those similarly situated, and certainly among that class are female students who wish to study the sciences. For even as all outstanding students should enjoy the benefit of the best available science facilities, *a fortiori,* those outstanding students who choose science as a career goal must enjoy that opportunity.

The other area of inequality is that of financial endowment. "Central High is the only high school in Philadelphia with a substantial private endowment." 400 F.Supp. at 329. While there is "no evidence that as a result of this endowment Central's facilities, faculty or course of instruction is superior to Girls," *Id.,* if there were no value to the endowment it would have no reason for being.

Although the instant case deals with sex-based discrimination in public education, there is certainly a parallel to be drawn between the effects of a denial of equal protection for reasons of race and sex. This Court has said with reference to racial discrimination in public education:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown* v. *Bd. of Educ.,* 347 U.S. 483, 493 (1953).

This Court has also stated that it will be guided by "equitable principles" when implementing decisions which deal with the unconstitutionality of racial discrimination in public education. *Brown* v. *Bd. of Educ.,* 349 U.S. 294, 300 (1954). It has struck down such discrimination even where

the separate facilities were otherwise equal. *Id.* Surely equity, as well as constitutional principle, dictates that respondents' discrimination on the basis of sex against the otherwise-qualified student cannot stand.

III

There is no "fair and substantial relationship" between segregating outstanding high school students by gender and respondents' stated objective of providing educational options for students.

Since a majority of this Court has not as yet found sex to be a suspect classification, *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), the state is not required to prove a compelling interest in order to justify a classification based on sex. The Court has evidently moved, however, from the mere rational basis test to an "intermediate" or "strict rationality" standard of review when faced with such a classification. *Berkelman* v. *San Francisco Unified School Dist.,* 501 F.2d 1264 (9th Cir. 1974), which was decided in light of *Reed* v. *Reed,* 404 U.S. 71 (1971), required the state to prove with sufficient facts that its classification had a basis. And in *Stanton* v. *Stanton, supra* at 11, the Court "subjected the reasons offered to support the statute to a greater scrutiny" than mere rationality. 400 F. Supp. at 340. An intermediate standard of review appears to be in use, but its exact parameters have not been set forth. "The district court concluded, and I agree, that since *Reed* v. *Reed, supra,* the rational relationship test is regarded by a majority of the court as inapplicable to gender-based classifications." Dissenting opinion below, 532 F.2d 880, at 896.

Respondent school district stated that one of its objectives is to "provide 'educational options' to students." [Dissenting opinion, *supra,* citing respondents' brief.] Utilizing an intermediate standard against which to measure the constitutional acceptability of respondents' conduct, the Board's single-sex academic high school policy must be shown to advance the Board's stated objective. The Board's policy of assigning "a vast majority", *Id.,* of its students to coeducational schools, while denying this opportunity to academic students, flies in the face of its own objective to furnish its students with educational options. "[T]here is *no option* of a coeducational academic senior high school." *Id.,* emphasis added. There is no showing by the Board that separating outstanding academic students by gender bears a "fair and substantial relationship" to its own above-stated objective.

> "[I]f coeducation is detrimental to girls, all the public schools should be sex-segregated; if it is not, then there is no 'fair and substantial' relationship between sex-segregtation and the educational goals of School Board." 400 F.Supp. at 342.

In fact, Congressional policy as set forth in the Equal Educational Opportunities Act of 1974, §203, is that "maintenance of dual school systems in which students are assigned to schools solely on the basis of • • • sex • • • denies those students the equal protection of the laws guaranteed by the fourteenth amendment." 20 U.S.C. §1702 (a)(1). Thus, not only does the Board's conduct fail to advance its own stated policy, it also falls short of the standard for equal protection and contravenes the intent of a Congressional declaration.

Conclusion

For the reasons set forth herein, we respectfully submit that the decision of the court beow should be reversed.

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December, 1976